Supreme Court, U.S.
FILED
MAR 22 1993
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No. 92-5653

In The

# Supreme Court of the United States

October Term, 1992

DORSIE LEE JOHNSON, JR.,

*Petitioner,*

v.

TEXAS

**On Writ Of Certiorari To The Court Of Criminal Appeals Of Texas**

## JOINT APPENDIX

MICHAEL E. TIGAR
University of Texas
School of Law
727 East 26th Street
Austin, Texas 78705
Telephone: (512) 471-6319
*Counsel for Petitioner*

DANA E. PARKER
Assistant Attorney General
of Texas
P.O. Box 12548
Capitol Station
Austin, Texas 78705
Telephone: (512) 463-2080
*Counsel for Respondent*

**Petition For Writ Of Certiorari Filed August 25, 1992**
**Certiorari Granted February 19, 1993**

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184 pp

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|---|---|---|
| 02/11/87 | DP BEGIN | |
| 02/17/87 | TRANSCRIPT FILED | |
| 07/29/87 | SF FILED | |
| 10/27/87 | SUPP TR FILED | |
| 05/27/88 | BRIEF FILED APP | |
| 07/26/88 | BRIEF FILED STA | |
| 12/14/88 | SUBMITTED | |
| 06/21/89 | OPINION ISSD | AFFIRM |
| 07/07/89 | MANDATE ISSD | |
| 09/01/89 | RECALL MANDATE MOT APP | FILED |
| 09/01/89 | RECALL MANDATE MOT APP | GRANTED |
| 09/11/89 | MANDAT RET | |
| 10/06/89 | REHEAR FILED APP | |
| 10/24/89 | REPLY TO REHEAR STA | |
| 11/22/89 | REHEAR DISP APP | GRANTED |
| | | N PARTICIPATING |
| 01/17/90 | SUBMITTED REHEAR | |
| 05/27/92 | OPINION ISSDREHDEN | |
| 06/08/92 | STAY MANDAT MOT TO APPFILED | |
| 06/08/92 | STAY MANDAT MOT TO APPGRANTED | |

NO. 5575

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| THE STATE OF TEXAS | § | IN THE 132ND |
| VS. | § | JUDICIAL |
| | § | |
| DORSIE LEE JOHNSON, JR. | § | DISTRICT COURT OF |
| | § | |
| | § | SCURRY COUNTY, |
| | § | TEXAS |

## CHARGE OF THE COURT

MEMBERS OF THE JURY:

The Defendant, Dorsie Lee Johnson, Jr., stands charged by indictment with the offense of capital murder, alleged to have been committed on or about the 23rd day of March, 1986, in Scurry County, Texas. The Defendant has pleaded not guilty.



Our law provides that a person commits capital murder when such person intentionally kills or causes the death of another person while such person is in the course of committing or attempting to commit the offense of robbery.

A person commits murder when he intentionally or knowingly kills or causes the death of another individual.

A person commits robbery, if, in the course of committing theft, and with the intent to obtain or maintain control of property, he either (a.) intentionally or knowingly causes bodily injury to another, or (b.) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.





"In the course of committing theft" means conduct that occurs in an attempt to commit, during the commission of, or in the immediate flight after the attempt or commission of theft.

"Theft", as that term is used above is the unlawful appropriation of the property of another with the intent to deprive such other person of the property.

"Appropriation" and "appropriate" as those terms are used herein, means to acquire or otherwise exercise control over property other than real property. Appropriation of property is unlawful if it is without the owner's effective consent.

"Property" means tangible or intangible personal property or a document, including money, that represents or embodies anything of value.

"Deprive" means to withhold property from the owner permanently or for so extended a period of time that a major portion of the value or enjoyment of the property is lost to the owner, or to dispose of property in a manner that makes recovery of the property by the owner unlikely.

"Effective consent" means assent in fact, whether express or apparent, and includes consent by a person legally authorized to act for the owner. Consent is not effective if induced by force, threats, or fraud.

"Owner" means a person who has title to the property, possession of the property, or a greater right to possession of the property than the Defendant.

"Possession" means the actual care, custody, control, or management of property.

"Attempt" to commit an offense occurs if, with specific intent to commit an offense, a person does an act amounting to more than mere preparation that tends, but fails, to effect the commission of the offense intended.

A person acts intentionally or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

"Bodily injury" means physical pain, illness or any impairment of physical condition.

3

All persons are parties to an offense who are guilty of acting together in the commission of an offense. A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible or by both.

A person is criminally responsible for an offense committed by the conduct of another, if acting with intent to promote or assist the commission of the offense he



solicits, encourages, directs, aids or attempts to aid the other person to commit the offense.

Mere presence alone will not constitute a party to an offense.

4

Before you would be warranted in convicting the Defendant, Dorsie Lee Johnson, Jr., of capital murder, you must find from the evidence beyond a reasonable doubt not only that Dorsie Lee Johnson, Jr., the Defendant, either acting alone or as a party with Amanda Lynn Miles, on the occasion in question was engaged in the commission or attempted commission of the felony offense of robbery, if any, Jack Huddleston as defined in this charge, but also you must find from the evidence beyond a reasonable doubt that during the commission of the robbery or attempted commission thereof, if any, the Defendant, Dorsie Lee Johnson, Jr., either acting alone or as a party with Amanda Lynn Miles shot Jack Huddleston with the intention of thereby killing or causing the death of Jack Huddleston.

Unless you find from the evidence beyond a reasonable doubt that the Defendant, Dorsie Lee Johnson, Jr., acting alone or as a party with Amanda Lynn Miles on said occasion, specifically intended to kill Jack Huddleston when he shot him, if he did shoot him, you cannot convict him of the offense of capital murder.

Now, if you find from the evidence beyond a reasonable doubt that on or about the 23rd day of March, 1986,

in Scurry County, Texas, the Defendant, Dorsie Lee Johnson, Jr., acting alone or as a party with Amanda Lynn Miles, as that term has been defined, did intentionally cause the death of Jack Huddleston by shooting him with a deadly weapon, to wit: a firearm while said Defendant was then and there in the course of committing or attempting to commit the offense of robbery directed against Jack Huddleston, then you will find the Defendant guilty of capital murder.

Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the Defendant of capital murder and next consider whether or not the Defendant is guilty of the lesser offense of murder.



Therefore, if you find from the evidence beyond a reasonable doubt that the defendant, Dorsie Lee Johnson, Jr., on or about the 23rd day of March, 1986, in Scurry County, Texas, did then and there intentionally cause the death of Jack Huddleston by shooting him with a deadly weapon, to wit a firearm, but you have a reasonably doubt as to whether the Defendant was then and there engaged in the commission of robbery or attempted robbery of Jack Huddleston at the time of the said shooting, if any, then you will find the defendant guilty of murder, but not capital murder.

If you find from the evidence beyond a reasonable doubt that the Defendant is either guilty of capital murder or murder, under the instructions given you, but you have a reasonable doubt as to which of said offenses he is



guilty, then you should find the Defendant guilty of the lesser offense of murder.

If you have a reasonable doubt as to whether the defendant is guilty of any offense defined in this charge then you will find the Defendant "Not Guilty".

7

Our law provides that a Defendant may testify in his own behalf if he elects to do so. This, however, is a privilege accorded a Defendant, and in the event he elects not to testify, that fact cannot be taken as a circumstance against him. In this case, the Defendant has elected not to testify, and you are instructed that you cannot and must not refer or elude to that fact throughout your deliberations or take it into consideration for any purpose whatsoever as a circumstance against Defendant.

8

You are instructed that in arriving at your verdict, you will consider only the testimony that you have heard from the witness stand in this case and the exhibits, if any, which have been admitted into evidence and you will not consider anything else. In this connection, you are instructed that you may take with you to the jury room any and all exhibits which have been admitted by the Court in this case.

9

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt.

The fact that a person has been arrested, confined, or indicted for, or is otherwise charged with the offense gives rise to no inference of guilt at his trial.

A grand jury indictment is the means whereby a defendant is brought to trial in a felony prosecution. It is not evidence of guilt nor can it be considered by you in passing upon the question of guilt of the Defendant.

The Defendant is presumed to be innocent until his guilt is established by legal evidence beyond a reasonable doubt; and in case you have a reasonable doubt as to Defendant's guilt after considering all of the evidence before you, and these instructions, you will acquit him.

You are the exclusive judge of the facts proved, of the credibility of the witnesses and the weight to be given their testimony, but you are bound to receive the law from the Court which is here given to you in these written instructions, and you mut be governed thereby.

After you retire to the jury room, you should elect one of your members as your foreman. It is the foreman's duty to preside at your deliberations, vote with you and when you have unanimously agreed upon a verdict, if you do, to certify to your verdict by signing same as foreman.

After you have retired to the jury room, no one has any authority to communicate with you except the officer who has you in charge. You may communicate with this Court in writing through the officer who has you in charge. Do no attempt to talk to the officer who has you in charge, or the attorneys or the Court, or anyone else concerning any question you may have.



After you have arrived at your verdict, the foreman will certify thereto by signing the appropriate form attached to this charge as foreman.

After argument of counsel you will retire to consider your verdict.

/s/ Gene L. Dulaney
GENE L. DULANEY,
132nd District Judge
Scurry County, Texas

IN THE 132ND JUDICIAL DISTRICT COURT
IN AND FOR
SCURRY COUNTY, TEXAS

| | | |
|---|---|---|
| THE STATE OF TEXAS | § | |
| V. | § | NO. 5575 |
| DORSIE LEE JOHNSON, JR. | § | |

STATEMENT OF FACTS

VOLUME XV - PUNISHMENT PHASE

November 12, 13 & 14, 1986
Snyder, Texas

* * *

[344] DORSIE JOHNSON, SR.,

called as a witness in behalf of the Defendant, being first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth, touching his knowledge upon the matters and things in controversy in said cause, testified as follows, to-wit:

DIRECT EXAMINATION

Questions by Mr. Conard:

Q. Mr. Johnson, would you tell the Jury your name and where you live, please, sir.



A. Dorsie Johnson, Sr. I live in Colorado City, 361 Sherman Street in Colorado City, Texas.

Q. And you are the father of Dorsie Johnson, Jr. -

A. I am.

Q. - who is the Defendant in this trial, are you not?

A. I am.

Q. Now, Mr. Johnson, of course, you have been here throughout most of the trial, have you not, sir?

A. Yes, sir.

Q. And you understand that the Jury has considered the evidence and has found your son guilty of committing [345] murder while in the course of a robbery here in Snyder?

A. Yes, sir.

Q. Now, you understand, don't you, sir, that what they have to consider now is what is the appropriate punishment in this case?

A. Yes, sir.

Q. Mr. Johnson, I would like to ask you some questions about Dorsie and his background that may help them in their decision. Can you tell the Jury, first, Mr. Johnson, how old Dorsie is?

A. He's nineteen years old.

Q. Was he born in Colorado City?

A. He was.

Q. How long have you lived in Colorado City, Mr. Johnson?

A. Fifty-one years.

Q. So you have lived there most of your life?

A. Yes, sir.

Q. Now, how long – well, is Dorsie's mother still alive, sir?

A. No, sir.

Q. When did she pass away?

A. October, '85.

Q. And –

[346] A. No, beg your pardon. October of '84.

Q. 1984. All right. How long were you and she married, sir?

A. Thirty-one years.

Q. And how many children did you have?

A. Four.

Q. Four kids. Were they all boys or girls?

A. Two boys and two girls.

Q. Did you live most or all of your married life in Colorado City?

A. Yes, sir.

Q. Okay. Now, Mr. Johnson, did you and your family attend church through the years?



A. Yes, sir, all the time.

Q. And can you tell the Jury where you attended church?

A. We attended church at Mount Zion Baptist Church, Colorado City.

Q. And how often did you attend church?

A. I'm there – still there two times on Sunday, sometimes three, and then through the week for mid-week service. I'm a deacon in the church. I'm a Sunday School teacher in the church. I'm also Chairman of the Deacon's Board.

Q. Okay. Mr. Johnson, through Dorsie's life [347] growing up, did Dorsie go to church with you?

A. All the time since he was – since I could get him in my arms and carry him. I carried him to church all of the time.

Q. Did your other kids also go?

A. Every time one got old enough that I could get him out of the house, I carried him to church with me.

Q. Have you always attended church as much as you told us that you do now?

A. Always.

Q. And the rest of your family as well, sir?

A. With me.

Q. Did your kids and your family all – in attending church did you all have a Sunday School in your church?

A. Yes, sir, Sunday School. Yes.

Q. Did the kids go to Sunday School?

A. When I went to church, they went with me. We always went to Sunday School, morning service and night service, BTU, Baptist Training Union in the evening.

Q. Until Dorsie was put in jail last April – well, first, was he still living with you until last April Mr. Johnson?

A. He was living with me at that time, yes, in April.

[348] Q. Had he lived anywhere else before that time in the past couple of years?

A. Yeah, he had been in Waco.

Q. Would you tell the Jury why he was in Waco?

A. His mother moved to Waco about '79 or '80 and she – well, she had a stroke down there. Then he wanted to go down there where she was and he moved down there.

Q. Can you tell the Jury why she moved to Waco, Mr. Johnson?

A. Well, we separated.

Q. And did any of the other kids go down there to be with her?

A. They stayed with me for awhile. Well, see, the other kids had grown up. They had already gone. And my daughter Venita, she growed up. She left and went down there, too. She was living down there close to her mama and her oldest sister.



Q. Did their mother need help? Was she incapacitated after her stroke?

A. Yes, sir.

THE COURT: You will have to speak up, Mr. Johnson. –

[349] A. Yes, she was incapacitated.

THE COURT: – I can't hear you.

A. Yes, she was incapacitated.

Q. (By Mr. Conard) You just need to speak loud enough so all of the folks on the Jury can hear you.

A. Okay. I'm sorry. She had to walk on a walker.

Q. Was that why the kids went down?

A. Some of it and some of it was because they had growed up and wanted to get away from home, I guess.

Q. Okay. Now, what about Dorsie's schooling through the years? Do you think – you were probably in the Courtroom when you heard the testimony about this school record and so forth, weren't you, sir?

A. Yeah.

Q. Can you tell the Jury what you felt about the way Dorsie did in school and his attendance?

A. Oh, he was devilish. He'd get into things. Me and him would have a big row about it. Sometimes I used my belt and tried to straighten him out and it looked like that it would because I'd get better reports on him, on his deportment.

Q. What about his grades and so forth, Mr. Johnson?

[350] A. Well, I had a meeting with the principal and also the superintendent one time and they always said that he had the potential to be an A student if he wanted to be, but he could get lazy and he could bring up some lousy grades. Then we would have it again.

Q. Did he sometimes try to make improvement in –

A. Oh, yeah, he – once we had a round, from then on the grades would go up and everything.

Q. What about his attendance in school? Did you have a problem making him go to school?

A. I didn't have a problem making him go to school.

Q. Was his attendance – did you feel that his attendance was pretty good or bad?

A. Well, if he had to miss school – you see, in his early age, he had bronchitis and when he'd go to get cold and damp, well, there was always the possibility that this would hit him. Sometimes it kept him in the hospital two or three days. He'd have to go under the oxygen tent. We kept him in the hospital. He'd be out like – but just playing hooky or like that, we didn't have that.

Q. You didn't have that?

A. No. Now, he got suspended for some of them pranks that he pulled. He got suspended for them.



[351] Q. Okay. Awhile ago you said he was devilish sometimes in school. Can you tell the Jury what you meant by that?

A. Oh, he seemed to like to always want to make somebody laugh. And whenever he would do that, well, he would be violating the rules. Then one time me and Mr. Lowrance talked about it and he said, "Sometimes he needs punishing." I said, "Well, punish him." He said, "Sometimes I feel like whipping him." I said, "Well, whip him. I do whip him." You know, he brought him to me on ten days suspension, cutting that boy on the back of the legs with that glass, and I told him I'd rather for him to tan his hide, you know, than for him to have to sit and miss school like that. But, anyway, when they brought him to me, I was working and I put him right along beside me. I said, "Buddy, you're going to work these ten days."

Q. Where were you working, Mr. Johnson?

A. I worked at the Compress, Cotton Compress. I put him right out there and give him a job. Let him work right along beside me.

Q. Was that when he was in the seventh or eighth grade. Is that correct?

A. (NO RESPONSE)

Q. About?

[352] A. I believe it was the eighth grade.

Q. Okay.

A. I believe it was.

Q. Did you talk to him about that incident, Mr. Johnson?

A. Talked to him every day.

Q. What were – how did he react to that?

A. He said he was just playing. He didn't mean to. He was just playing, that he just hit at him. He didn't think he was going to hit him, but he did.

Q. Was he sorry it happened?

A. He told me he was.

Q. Do you remember this other incident that you probably heard about the boy that –

A. Rocky.

Q. – with the bottle?

A. Uh-huh.

Q. Yeah.

A. He told me it was an accident. He said he was messing with him and the boy stepped back into it.

Q. How did he feel about it happening?

A. Well, he and Rocky were good friends and after that, they were good friends.

Q. Did he ever tell you his story about that [353] happening?

A. He said he didn't intend to do it.

Q. Did he and Rocky run around together –



A. Yeah.

Q. – after that?

A. Over at his house and Rocky would come over to our house.

Q. Did you think Rocky was afraid of Dorsie after that?

A. Didn't act like it.

Q. Mr. Johnson, you have heard some of the folks testify that Dorsie was using marijuana. I think you have heard some testimony about using cocaine.

A. Yeah.

Q. Did you know about that?

A. No, I didn't. Now, marijuana, I never saw him smoke – I never saw him smoke a cigarette. I never saw him use any of it. I never – I've never saw him take a drink. I know he did because I smelled it on him.

Q. Did you ever talk to him about it?

A. Yeah. That was the main sermon I preached to all of them: Drinking is no good. Drinking don't profit you anything. Drinking weakens your resistance. You spend but don't get nothing for your money.

[354] Q. Did you ever find out about drug usage?

A. (NO RESPONSE)

Q. Did you ever find out that he was using marijuana or any other drug?

A. You know, just on hearsay.

Q. Did you ever talk to him about that?

A. Sure, yeah.

Q. Do you remember about when you first found that out?

A. Well, I went to Waco to visit them while they were – while he were down there. My other daughter lived down there, too, and I – every chance I'd get, I'd go down there and visit. And they talked about it then after his mother died and that he might've been playing around with it and they was getting on him about it. And then after his sister died, she was killed – well, then that looked like it sort of set him off. He tried to find some relief because he was wrapped up in his mother and he was wrapped up in his older sister.

Q. Mr. Johnson, you said his mother died in October of 1984?

A. Uh, huh.

Q. When did his sister die, sir? .

A. In October of '85.

[355] Q. Is that the sister that was in Waco?

A. No. She was – lived in Dallas.

Q. In Dallas?

A. Uh-huh.

Q. Did Dorsie say he was wrapped up – did he visit her and –

A. Yeah.



Q. How did they get along together, Mr. Johnson?

A. Beautifully.

Q. Did they visit on a regular basis?

A. Well, no. She lived in Dallas. He was in Waco and I lived in Colorado City. I couldn't say.

Q. How much older was she than Dorsie?

A. She was born in '59 and he was born in '67. She would be – that would be eight years older than him.

Q. Was she always around as he was growing up until she left home?

A. Yeah.

Q. Was she a married lady, sir?

A. She was at the time when she died, yeah.

Q. What happened to her, sir?

A. She was murdered. She was shot in the back of the head.

Q. Just her?

[356] A. Her husband – her and her husband both.

Q. Did it – was this in Dallas?

A. In Dallas.

Q. Did the police find out who did it, Mr. Johnson?

A. They did.

Q. Who did it?

A. My grandson.

Q. Their child?

A. No. I got a step daughter. She had a boy just under his age. He was living with them.

Q. All right. How did Dorsie take that, Mr. Johnson?

A. Hard, very hard. He and this grandson for the last, well, nearly two years had lived together with his sister and they thought them to be very close. Well, when Dorsie come home and left him down there, he got – he got his auntie and he wanted to move to Dallas with her and get him a job up there and go to work and which he did. And then things went wrong somehow. He's been punished for murdering her and her husband.

Q. The grandson?

A. Yeah.

Q. Okay. How did Dorsie take the loss of his [357] mother, Mr. Johnson?

A. His mother?

Q. Yes, sir.

A. Well, he took that hard, too, because he loved his mother. It was always a problem between me and her. He loved us both.

Q. Did he start changing any at all after these things happened, after the loss of his mother and the loss of his sister?



A. Well, sir, after the loss of his mother, I think that might've started some of it. Then after the loss of his sister, he was just devastated.

Q. How did he change, Mr. Johnson?

A. Now, I attributed it to maybe it made him grow up or something because he was always my baby. He was my little boy. And then when he changed, well, when he began changing, I contributed that to that he growed up. He was growing up, you know, and, well, I'm a man –

Q. Did he still go to church after his sister's –

A. Oh, yeah. When he came back here with me, he didn't go as often as he was – used to go, you know, as he had been going. When I got up on Sunday morning, I said "All right. Buddy, I want to see you in church. I don't [358] care anything about you being eighteen years old. I want to see you in church." "Yes, sir."

Q. Did he go usually?

A. Yeah, he'd go. He'd go one day, you know. He'd go to the morning service.

Q. Did he participate in the church activities at all?

A. He slowed up on that.

Q. What had he participated in in the past?

A. Oh, in the youth department choir, purser.

Q. You said he was always your baby. Is he the youngest of your four kids?

A. He's the youngest.

Q. Have you ever known Dorsie to hurt people intentionally as he was growing up, Mr. Johnson?

A. No. You know, he was always peculiar about – particularly about hurting people's feelings. He was always so humble, you know. People could talk down on him and everything. And around me, he was always – he wasn't always ready to bristle and fight. He was always so humble.

Q. Did he have friends growing up?

A. All the time. Somebody at the house all the time.

Q. You have heard – I think you heard some [359] folks testify about a few things he got into, I suppose, from the seventh grade forward. Did he pursue the normal activities then that a teenage boy pursues growing up?

A. To me.

Q. What things did he do in school the rest of the time, Mr. Johnson?

A. Now, he, too – he loved sports.

Q. Did he play sports?

A. Yeah.

Q. What sports?

A. Football, track. He wanted to play basketball, but he was too short. But he loved sports and he was pretty good at them, at least the coaches say he was. He was short. I've seen him run a hundred yard dash with some guys and win third place. So he was pretty good.



Q. Okay. Mr. Johnson, you understand, of course, that, don't you, that what the Jury has convicted him of is a horrible thing?

A. Yes, sir.

Q. And he is charged with doing another horrible thing in Colorado City?

A. Yeah.

Q. Do you think – what do you think could have made him do those kinds of things, Mr. Johnson?

[360] A. The only answer is the answer I get from everywhere else from every angle of life, every part of life that I know about is foreign substances, drugs. Without them, seems like in all of life that I've been able to gather from it, the way it affects not only him but everybody else. Without them, people are different. Deprive them, people are different. With them – let me say this, please. May I?

Q. Sure.

A. In my youngest days – I was about nineteen, twenty, twenty-one or twenty-two, like that, when I got out of high school – I graduated from high school. I went to work at that same compress where I was telling you about I was working at. And I got around older men. There was older men that worked down there. And they drank and they got me to understand that you take a drink every once in awhile and it makes a man out of you. Well, I thank God it didn't take me long to find out that that was wrong. I didn't get attached to it. I didn't get where I depended on it. I didn't get to the place where it altered me because I let it alone. And – but I say

from these phases of life, drugs – from all of the books I've read and studied about it, it makes you worse. It alters you. They alter your thinking. They alter your habits. They alter your control. And once you're deprived of it, I believe – they say that's the reason they go to [361] these places where they can be rehabilitated. Then if you get – if you let it alone, you can control yourself, you can behave yourself and you're a different person. Without them, you're a different person. This I know. I have experienced that. Without it, you're a different person. Your reasoning is different and everything else and that's my son and I love him. And I'd plead before President Reagan and anybody else for a chance for him. And I say lock him up, get him away from the environment and these habits and he could be a different person.

Q. Mr. Johnson, let me ask you about some of the people he ran around with in the last year or two. Were you aware of some of the people he was around the last year or two?

A. Yeah.

Q. Were you happy with them?

A. No.

Q. Why not, Mr. Johnson?

A. Same problem: Drugs, drinking.

Q. Did you talk to Dorsie about that?

A. All the time. I – I've fussed with him, argued with him. "Daddy, I'm not going to do this. All right. Daddy, I'll quit." But he –



Q. Did he get away from those folks?

[362] A. Lord oh mercy, I wish he had.

Q. Mr. Johnson, if the Jury – if Dorsie were put in the penitentiary for twenty or thirty or forty years, a life sentence, and removed from those people and removed from drugs, do you think that down the line if he ever got out, he would go back to doing the same thing that he is charged with doing here today or that he has been convicted of doing here today?

A. Like I said, he got the background and what it takes to be a decent person. Now, he's had both sides of it. He knows what it takes to make him a different person. I don't know why it would be hard to make the choice.

Q. Do you think at the age of nineteen that he is a real mature person?

A. No, no. Age of nineteen? No, sir. That, also, I find to be a foolish age. That's a foolish age. They tend to want to be macho, built-up, trying to step into manhood. You're not mature-lized for it.

Q. Mr. Johnson, is there anything else that I haven't asked you about that you think this Jury ought to hear that can help them in making their decision about Dorsie?

A. This – even at this time when he's going through this phase, he's been – at night when he come home, he always comes home between 10:30 and 11:00 o'clock or there [363] about 10:45 or ten minutes until 11:00 at night during the week. I could always know just about what time he'd be home. Most of the time I hadn't gone to bed. Most of the time I had been up looking at the T.V. He

come in, sat down and talked to me. We talked about this and that and everything and if he had been doing anything, if he had been taking any drug or using any drugs that night or anything, I couldn't tell it. And I'm not expert on it because I never was around them. But, you know, he was a normal person anytime he come in. On the weekends he stayed out a little later because he's [sic] go to parties and things like that. Along about 1:00 or 1:30 or something like that I'd hear him come in the door. "Pop, I'm home." That's the way it went.

Q. In your opinion, Mr. Johnson, do you think if he had not been using drugs, would he have done the things –

A. No, sir.

Q. – that he has –

A. It's – he just didn't have that kind of nature. He was devilish, true, but not to harm anybody like that, no.

Q. When you say devilish, do you mean mischievous?

A. Pranks.

Q. Mean?

[364] A. No, pranks. Trying to be funny. He always wanted somebody to laugh. It was funny. He'd come up and tell you, "See these shoes I got on? I went to New York and got them." Wasn't no way in the world he could've went to New York and got them. He – just like that.



Q. Mr. Johnson, you have been visiting Dorsie up here in the jail and, I guess, some here in the Courthouse –

A. Uh-huh.

Q. – during this trial –

A. Yes, sir.

Q. – since he has been in jail, haven't you?

A. Right.

Q. Have you talked to him about this crime or what happened?

A. Yeah.

Q. Has he expressed sorrow to you?

A. Oh, every time I go in there, he break down.

Q. What do you mean, sir?

A. Cry.

Q. About what?

A. He don't like to see me unhappy like this. If there's anything he could do to change it so I wouldn't have to suffer like this, he'd do it.

[365] Q. Have you ever talked to him about Mr. Huddleston?

A. No.

Q. Has he ever told you that he was sorry he did it or wishes it hadn't happened or anything like that?

A. Every time I talk to him, "Daddy, I wish I could change it. I wish it never had happened. I wish I had listened more closely to what you said and the way I was raised. I just got off, got into that stuff. It got the best of me."

Q. I guess you yourself have prayed about this, haven't you, Mr. Johnson?

A. Every night and every day.

Q. Have you and Dorsie prayed about it?

A. We've prayed together about it.

Q. Is there anything you want to tell the Jury, Mr. Johnson, that I haven't asked you?

A. I just beg the Jury to consider that somebody loves him and if they'd give him a chance to be considered, that if he was locked away, away from that environment, why, he could be rehabilitated. He would be all right. He just got off to where he got – he got off into something he couldn't handle. He didn't know how to turn it loose. The people he was around wasn't interest in him turning it loose. [366] When he gets around me, he's ashamed. He didn't want me to know that he was in that kind of condition. So he would – he conveniently concealed it. I asked him about it. "No, Daddy. No, you know I wouldn't hurt you that way." The only thing that I didn't know because I never did see him smoke, they referred to a joint. I never did see him smoke one. I've smelt it on him and I've gotten after him about it, but I never did see him smoking one. I never did see him take a drink. If I come up to where him and his friends was, if they were drinking, I never did see him. If he gets out



from around them – I just beg the Jury to consider that. If he had a chance to be locked away from it he could be a decent person.

MR. CONARD: Thank you, Mr. Johnson. Pass the witness.

[367] CROSS EXAMINATION

Questions by Mr. Armstrong:

Q. Mr. Johnson, I realize this is a difficult thing for you. Quite frankly, it is difficult for all of us. But is [sic] I understand your testimony, you are telling us that drugs and his mother's death is what changed Dorsie?

A. Contributed to it, yes, sir.

Q. All right. And, yet, you never saw him drink, you never saw him smoke marijuana. He would come in at 10:00 or 10:30 each night and you didn't know that he had been using drugs. Is that right?

A. That's right.

Q. You couldn't tell that he had been on drugs, I think, is the way you put it. Is that right?

A. (WITNESS NODS HEAD)

Q. He was never arrested and charged with possession of or the use of drugs?

A. No, not here. Not in Colorado City.

Q. What about Waco?

A. Not that I know of.

Q. All right. That is what I was talking about.

A. No, not that I know of.

Q. But when you came up among his friends, he [368] would get away from it. In essence, he did what he was doing –

A. That's right.

Q. – from you? And he would tell you, "I am not doing these things"?

A. Yes, sir.

Q. And then he would always say, "I'm going to quit." Right?

A. (NO RESPONSE)

Q. He was going to quit doing those things?

A. Well, he was talking about quit running around with the bunch he was running around with.

Q. All right. Who is the grandson that Dorsie ran around with?

A. Ronald Taplin.

Q. Taplin?

A. Uh-huh.

Q. I was saying Tarplin the other day.

A. Taplin.

Q. And he is being punished for the crime that he committed?



A. He is.

Q. You are telling me that – you tell us that you raised Dorsie in the church. You taught him what was right [369] and what was wrong.

A. Near as I could. Near as I knew how.

Q. You taught him that every person is given by God the ability to make choices between right and wrong?

A. Right.

Q. You told him that when they make those choices, they are responsible for the consequences?

A. Right.

Q. And you say he started changing after his mother died?

A. That's right.

Q. But by then he had – according to the testimony, he had already cut Fred Dakan on the legs and got him expelled from school?

A. Uh-huh.

Q. He had taken, apparently, a sharp piece of glass to another boy that supposedly was just his friend and sent him to the hospital. Did you know Rocky went to the hospital?

A. Yeah. Said he went to get stitching.

Q. Stitches, yes, sir.

A. That's what I was told.

Q. Did you know Rocky didn't tell the coach and the school people at first because he was afraid that Dorsie [370] was going to cut him again?

A. No, I didn't know that.

Q. It is in those school records, Mr. Johnson. Did they not show those to you?

A. Hu-uh.

Q. Okay. And, of course, that was before Dorsie's mother died?

A. Oh, long before then, yeah.

Q. Yeah. And then he burglarized a building, a business there in Colorado City back in 1982?

A. Now, he brought a jumpsuit back and he carried it and turned it over to the police.

Q. And then left town, didn't he?

A. (NO RESPONSE)

Q. That is when he moved to Waco, isn't it?

A. No. That's when he come back from Waco and brought that stuff back.

Q. That is what he stole from the store in Waco, isn't it?

A. No.

Q. It was in December of 1982 that he broke into the store there in Colorado City?

A. (NO RESPONSE)



Q. Mrs. Dakan –

[371] A. That's what I'm trying to say. They never did say – nobody ever said that he broke in there. See, I went to the police. They didn't say he broke in there. He told them how he got it and that's the way they let him go.

Q. Yeah, but I understand what he told them then, but we have had evidence today or this week that he broke into that store and stole those things.

A. Well, that's the first time that I knew that he did –

Q. All right.

A. – because I was under the understanding that he didn't get it out of there, that it was given to him and that's what – the way it comes down with the police.

Q. That is what he told you?

A. That's what the policy said.

Q. Okay. But Dorsie told you that, also?

A. Yeah.

Q. All right. Sort of like when you come up on his friends and he is doing something that is wrong, he hid it from you?

A. I understand that.

Q. Is that what you are saying?

A. I understand that.

Q. And that was still two years before his [372] mother died, wasn't it?

A. Uh-huh.

Q. And, in fact, that was when he went to Waco, isn't it?

A. (NO RESPONSE)

Q. He checked out of school here in high school or in junior high on December – or maybe it was the high school and went to Waco, isn't it?

A. (NO RESPONSE)

Q. Isn't that when he went to Waco?

A. Yeah, but he had already been down to Waco. He just went back. He'd come –

Q. He went to Waco when he was in the eighth grade. Right?

A. Yeah.

Q. The first time?

A. Uh-huh.

Q. Is that right?

A. Uh-huh.

Q. He had gotten in trouble then, too, hadn't he, and he went to Waco?

A. No, hu-uh.

Q. And then when he got in trouble down at Waco and then he came back to Colorado City –

[373] A. Not in the eighth grade.



Q. Went the whole year in the ninth grade here in Colorado City?

A. Uh-huh.

Q. Then the tenth grade, he was about fifteen and he was already smoking dope and drinking alcohol with his friends at age fifteen?

A. (NO RESPONSE)

Q. Right?

A. I didn't know about it.

Q. Okay. He hid that from you?

A. Yeah.

Q. But the young lady that he dated then, Paula Williams, she was in Court the other day, she said when he was fifteen he was always – he was already smoking pot, smoking dope I think is what she said, and she argued with him. She apparently did, like you did, told him not to do that.

A. Yeah. I heard her say that.

Q. Okay. And that was still two years before his mother died. Right?

A. She died in '84.

Q. In 1984?

A. Uh-hu.

[374] Q. And so when he got in trouble again in 1982, he withdrew from school December the 13th, 1982?

A. He wasn't in no trouble then.

Q. That is when Doug Smith said they burglarized the athletic store in Colorado City. On December the 13th, 1982, is when he withdrew and went to Waco again.

A. Yeah. He went, but I mean he was already going before that happened, I guess, because – well, the plans had already been made for him to go.

Q. Was he already in trouble then?

A. No, not – he wasn't in no trouble about that because he went to the police –

Q. Every time –

A. –and they said no.

Q. Every time he got in trouble, either the school talked to him or you talked to him. Right?

A. As far as I know.

Q. Told him that could not be – that was unacceptable conduct. Right?

A. Uh-huh.

Q. And just could not continue. Remember that?

A. Yeah.

Q. Do you remember when he cut Rocky Salazar? You remember when he was suspended from school then?

[375] A. Yeah.

Q. They brought him out of you, didn't they?



A. They did.

Q. And you punished him?

A. I did.

Q. How did you punish him?

A. With a belt.

Q. And they suspended him and put him on probation there in school until October 10th. Do you remember that?

A. Uh-huh.

Q. Do you remember, Mr. Johnson, what happened on October the 10th, the day he came back to school and got off probation?

A. No, I don't.

Q. Dorsie stabbed Dennis Pfeuffer. Do you remember Dennis Pfeuffer?

A. Yeah. He spent lots of nights with him at his home.

Q. Dennis – Dorsie stabbed Dennis Pfeuffer in the hand with a pencil. He made a stabbing motion at his stomach and then stabbed him in the hard. Dorsie said it was an accident. This was Dorsie's first day back at school since he was suspended October the 10th, 1980 – 1979. That didn't [376] – it didn't do any good to discipline him and tell him that it was wrong and punish him for it that time, did it, Mr. Johnson?

A. Well, I didn't even know about that.

Q. All right.

A. The school never said anything to me about it.

Q. And he told you it was just an accident?

A. I didn't even know anything about it.

Q. All right. Well, he told you it was just an accident when he cut Fred Dakan on the legs. Do you recall they suspended him again then?

A. Yeah.

Q. And again he says that is just an accident. Right?

A. That's what he said.

Q. He picked up glass and, according to the testimony we heard in the Courtroom, he cut one of the legs of Fred Dakan and Mr. Dakan bled and then he cut the other leg with a piece of glass and he says it is just an accident. That is what he told you?

A. Uh-huh.

Q. But talking to him – you punished him again, I take it?

[377] A. I did.

Q. And how did you punish him then?

A. With the same way. I talked to him and had him understand the pranks had to quit. The pranks wasn't no good. He could've hurt him. At the time I was up there and they was practicing track. I was up there to pick him up and Fred came by and he just had a little trickle of blood on one leg. And I said, "What happened to you?" And he didn't say anything. He just kept on going.



Q. Might have been afraid, you think?

A. I don't think he was afraid –

Q. That was before his – Dorsie's mother died –

MR. CONARD: Your Honor, I object to the Prosecutor interrupting Mr. Johnson's sentences and not allowing him to complete his answer.

THE COURT: All right. I will sustain the objection.

Q. (By Mr. Armstrong) That was before Mrs. Johnson died –

MR. CONARD: Well, Your Honor, he needs [378] to go ahead and finish his answer.

MR. ARMSTRONG: Judge, I am asking him –

THE COURT: Yes, but I think you asked him a question and then he didn't – before finishing his answer, you asked him another question. You asked him was that before his mother dies.

MR. ARMSTRONG: Well, his answer wasn't responsive.

THE COURT: I never did hear what the answer was.

MR. ARMSTRONG: I want to ask the question.

THE COURT: All right. Ask him again and we will see what he says.

Q. (By Mr. Armstrong) All of this was before his mother died, wasn't it?

A. Yeah.

Q. And it was right after that – you said that was in the eighth grade. It was right after that that he went to Waco again or that was the first time he went to Waco?

A. His mother came and got him.

[379] Q. Yeah. All right. He stayed there in Waco for awhile and when he came back that summer when he was fifteen, he was smoking dope and running around with a bad crowd, drinking liquor and not telling you?

A. No. The only thing that I could say was that he was home when he was supposed to be. If he was at school at some curriculum, I picked him up. I brought him home. He did not run around at that time.

Q. All right. Then when he got in trouble again in 1982 when he went to Waco, he went to Waco again in December, 1982 –

A. Well, he had already been –

Q. Well –

A. Well, he had already been and came back for Christmas, came back for – let's see. He started school here. Then he went down for Thanksgiving. Then when he came back, he decided he wasn't going to go back down there. That's when we made the preparation for him to go back down there.

Q. All right, sir. But he withdrew from school on December 13th?

A. Uh-huh, at my permission.



Q. Yes, sir. That was when – whether it was a coincidence or otherwise, that was exactly when he and Doug Smith broke into the athletic store?

[380] A. That wasn't the reason he went back to Waco.

Q. Okay. But he did go to Waco then?

A. Yeah.

Q. He didn't always tell you what he was doing and what his reasons were?

A. He was supposed to be going back down there for Christmas.

Q. And he stayed there for awhile?

A. He stayed there for the rest of that year.

Q. All right.

A. The rest of the school season.

Q. Until he got in trouble again and then he came back to Colorado City?

A. No, he came back here and then went back down there again before he got in that trouble.

Q. He went back down there again in September of 1984. He burglarized a business there in Waco with Ronald Taplin, didn't he?

A. Uh-huh.

THE COURT: I didn't hear your answer.

THE WITNESS: Yes, sir. I guess I didn't know when it was.

[381] Q. (By Mr. Armstrong) Well, according to the testimony, I believe it was yesterday or it may have been the day before yesterday, Mr. Bahlmann introduced the judgment where he was convicted for committing –

A. He did. Yeah, he did, but, like I say, I didn't know when it was.

Q. Okay. According to that evidence, it was September the 24th, 1984. He and Ronald Taplin burglarized that business there in Waco. Do you know which business it was?

A. No.

Q. All right. And it was right after that that Ronald Taplin murdered Dorsie's sister and brother-in-law?

A. That was in '85.

Q. Yeah. It was just a couple of months. Right?

A. (NO RESPONSE)

Q. Just a few –

A. You said '84 when he burglarized that place?

Q. September of 1984, just a –

A. This was October in '85.

Q. All right, sir. Okay. But they burglarized that store there in Waco before Mrs. Johnson died? Before his mother died, they burglarized that store?

[382] A. I'm not sure. Seems like I thought she died on September the 7th. It might've been October the 7th. I thought she died on September the 7th.



Q. All right. Either way, two weeks after his mother died or two weeks before she died, he is out with Ronald Taplin?

A. It must've been after because he was there.

Q. Of course, he had already been there.

A. He was there when she died.

Q. Yeah. So he must have burglarized it before. Right?

A. No, because he came here.

Q. He came here what?

A. After he burglarized that place.

Q. Yes, sir.

A. He came here.

Q. That is right.

A. Like I say, he was there when she died so –

Q. Yes. sir. He would still have been there. He didn't come here until April or May of 1985. He was on probation there in Waco. Right?

A. Well, wasn't it '85 when he done that?

Q. No, sir. He was placed on probation in January of 1985.

[383] A. Well, that's what I'm talking about. She died in '84.

Q. But he was – he did the crime in September. You don't go to trial the next day, usually. And he was on

probation. They told him on probation that that is wrong to do that, to break into somebody else's store and there are certain rules you have to live by on probation. And the probation officer said he wouldn't live by those rules, even though the probation officer sat down and talked with him. He wouldn't live by those rules. I guess he didn't tell you that, either, did he, Mr. Johnson?

A. No.

Q. No, he didn't.

MR. ARMSTRONG: I pass the witness.

[384] REDIRECT EXAMINATION

Questions by Mr. Conard:

Q. Mr. Johnson, did Dennis Pfeuffer visit back and forth with Dorsie?

A. Yeah. He spent a lot of nights over at his house. Stayed all night with him.

Q. You weren't there when this pencil incident happened at school, were you?

A. No, I wasn't here.

Q. You didn't know whether they were playing –

A. No.

Q. – or what happened?

A. No, I don't.

Q. You started to tell the Jury about Fred Dakan's leg, what you saw on his leg. Would you finish telling



them what you saw on Fred Dakan's legs – on his – I believe it was the right leg.

A. I was – just looked like it had been scratched and the blood didn't run. It just made a spot on there. That's the way the leg looked because I saw him trottin in and I didn't even see no scratch on that other leg.

Q. Okay.

A. They were supposed to have been running cross [385] country. Of course, he was doing that when they came in. They were running, too. I believe it was him and Rocky.

Q. Is there anything else I haven't asked you that you need to tell the Jury or that you think you need to tell the Jury, Mr. Johnson?

A. Mr. Conard, all I can say is I still think that a kid eighteen or nineteen years old has an undeveloped mind, undeveloped sense of assembling not – I don't say what is right or wrong, but the evaluation of it, how much, you know, that might be – well, he just don't – he just don't evaluate what is worth – what's worth and what's isn't like he should like a thirty or thirty-five year old man would. He would take under consideration a lot of things that a younger person that age wouldn't. An act of impulse and if you've got something to push it, a breakdown in your resistance, then you'll act before you have time to evaluate what's going on. In my experience, like I said, that young age, I took a drink or two and if I got in my car – most of the time if I was going to drive anywhere, I didn't bother with drinking. But if I did get in there and had a drink, I had a tendency to drive faster

than I normally would drive because my sense of evaluations wasn't all right. But when I didn't have nothing to boost me, I'd say, "No, that's too fast." I controlled myself. And from what I read on drugs, it's [386] worse. You lose value, the value of things. That's the reason I said if he was locked away from it where next time around he would evaluate, he'd have a different value of what his life is, especially towards other people. He'd have a different value.

MR. CONARD: Thank you, Mr. Johnson.

A. It would be mature.

MR. CONARD: Thank you, Mr. Johnson. Pass the witness.

MR. ARMSTRONG: No further questions, Your Honor.

THE COURT: You may step down, Mr. Johnson.

You may call your next witness, Mr. Conard.

MR. CONARD: May I have a moment, Your Honor?

THE COURT: Yes.

[REPORTER'S NOTE: Discussion off the record between Mr. Conard and the Defendant.]

[387] MR. CONARD: Your Honor, the Defendant rests.

DEFENDANT RESTS

THE COURT: Do you have any rebuttal testimony, Mr. Armstrong?



MR. ARMSTRONG: Yes, Your Honor, I do.

THE COURT: All right.

MR. ARMSTRONG: Call Mike Bailey.

THE COURT: Better swear you in again, Mike.

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[414] Argument on behalf of Texas

MR. ARMSTRONG: Your Honor, if it please the Court, Mr. Conard.

MR. CONARD: Mr. Armstrong.

MR. ARMSTRONG: Ladies and gentlemen of the Jury, I come before you again in the last part of this criminal trial. The last part of any criminal trial being the Jury summation at the conclusion of the punishment evidence. The trial has gone quicker than we anticipated. As I indicated Wednesday, it has gone quicker than I had anticipated. Again, it does not lessen the fact that you have served through a long and trying week and I appreciate it. I thank you for your service.

The Judge has read to you the Charge. Again, as before, you will get the Charge with you when you go into the Juryroom. Again, read it, study it, deliberate on the issues, consider the evidence and return a verdict, a verdict that I believe that you know that this evidence has shown beyond a reasonable doubt, beyond any doubt as the only just and proper verdict that can be entered in this case based on the evidence; that is, a verdict of yes to

special issue number one and an answer of [415] yes to special issue number two.

Let's talk just about those special issues. Special issue number one, "Was the conduct of the Defendant, Dorsie Lee Johnson, Jr., that caused the death of the deceased committed deliberately and with reasonable expectation that the death of the deceased or another would result?" Of course, there is no another in this case. We are going to talk about that a little bit, but I also – I want to talk – before we do that, I want to talk about that special issue.

If you will recall at voir dire, we talked about the word deliberately probably being the key word in that question. I submit to you, ladies and gentlemen, that the evidence shows overwhelmingly, again, beyond any doubt that not only was Jack Huddleston killed intentionally, but he was killed deliberately with whatever definition, whatever meaning you ascribe to the word deliberately.

Dorsie Lee Johnson, Jr., the Defendant in this trial, in this case took the deceased and laid him on a floor. If you will recall the evidence, laid him on his stomach, if you will recall the evidence, nose down to the floor and shot him [416] in the back of the head. It was no accident. It was more than just intentional conduct. It was the will of Dorsie Lee Johnson, Jr., to do that.

How do we know that? Because he planned it. You will also recall, perhaps, that premeditation is not required to be proven, but we proved premeditation. Dorsie Lee Johnson, Jr., went to Allsup's Convenience Store for no reason but to rob that store and leave no witnesses and he stayed there from at least 3:00 o'clock in



the morning to about 4:20 planning and discussing with his cohort, Amanda Lynn Miles, how they could not leave any witnesses.

"We then drove around a little more and talked about how we would rob Allsup's. We both agreed that there couldn't be any witnesses." Premeditated. Premeditation is not required. The State proved premeditation. They deliberated, if you will, in the horriblest sense of the word.

We use that word to say that a jury weighs and considers all of the facts and the evidence and determines what the proper course of conduct is. They deliberate. They act deliberately. And Dorsie Lee Johnson, Jr., did the same thing in [417] the most perverse way that that word can be used. He sat around and planned how "we'll get the clerk into the cooler and kill him."

You will recall there is other evidence. His brother-in-law – "Dead men can't talk," he told his brother-in-law with a laugh. He was still bragging about it a month later, a month and a half later, whenever it was, whenever he shared the same cell with Ed Ramshur. "Why? Why did you kill the man? You already had the money, you had him helpless, why did you kill him?" Paraphrasing, "Because I deliberated on it and thought about it and realized we couldn't have any witnesses and so I took away any chance that he would have to have a continuing life with his parents, with his wife, with his children, with his grandchildren and I deliberately shot him in the back of the head."

There can be but one answer: "We, the Jury, find and determine beyond a reasonable doubt that the answer to special issue one is yes."

I want to call your attention, though, to one other part of that special issue. I could not help but be hit in the face when I heard the Judge read the special issue, and I have dealt with this [418] special issue for six months. But it really hit me again when I heard him read it out to you just a moment ago. "Was the conduct of the Defendant, Dorsie Lee Johnson, Jr.," says so in the Charge, says the name, "that caused the death of the deceased," and there is not another comma. It doesn't say Jack Huddleston. Just goes on and asks the rest of the question. "Was it with the reasonable expectation of the death of the deceased, and it just goes on and asks the rest of the question.

Have we forgotten Jack Huddleston? Pencil it in your mind. Caused the death of the deceased, Jack Huddleston. Deliberately, premeditated, cold-blooded. The answer is yes.

Special issue number two. "Is there a probability that the Defendant, Dorsie Lee Johnson, Jr., would commit criminal acts of violence that would constitute a continuing threat to society?" A key word, probability. Is it more than a possibility? Is it more likely than not? In street parlance, is it a good chance that he is going to do criminal acts of violence and will – or are they the kind as directed at himself or at others? Bad deeds, [419] criminal acts of violence. We are talking about more than writing hot checks. We are talking about the type of things where



you hit somebody in the nose. We are talking about the kind of thing where you throw a brick at them. I am –

MR. CONARD: Your Honor, I object to that as a misstatement and misapplication of the law as it invites the Jury to apply relatively minor infractions of the law to that special issue.

THE COURT: Well, it is argument. He is drawing, I think, a reasonable inference. So I will overrule the objection.

MR. ARMSTRONG: Thank you, Your Honor.

MR. CONARD: We would ask – well –

MR. ARMSTRONG: Thank you, Your Honor.

Again, ladies and gentlemen, the State has the burden of proof. The Charge tells you that. We have to prove what the proper answer is to each question beyond a reasonable doubt, to prove that there is a probability, a more – it is more likely there is a good chance it will happen.

The State doesn't have the burden of proving beyond any doubt, a hundred percent sure, that it absolutely will happen. Think over that word [420] absolutely and compare it to probability when you consider that special issue because I submit to you, ladies and gentlemen, that the State has proven beyond any doubt, even though we don't have to, that there is a probability, that there is a very good chance that it is highly likely, that this Defendant will continue to be a threat to society.

What kind of person is Dorsie Lee Johnson, Jr.? Before this trial you didn't know. You – I believe most of

you had never heard of him, except the fact that he had perhaps been charged, the same thing that every Juror was told. But you now know that he is a cold-blooded, heartless, premeditated murderer. You now know that he has been without remorse, without sorrow for criminal acts of violence since the time he was twelve years old, starting in the seventh grade.

You now know that he committed aggravated assault on Rocky Salazar. You now know that he cut Fred Dakan on the legs. And don't give me this accident bit. You don't pick up a broken piece of glass and accidentally cut into another human being on the legs. But if you want to give him the benefit of the last possible vestige of doubt on [421] that case, that crime, you can.

You now know that he went ahead and cut the other leg. That is what Fred Dakan said. You now know and it is in evidence and you can examine it and look at it that even after having been placed on probation, he came back from probation, school probation, and stabbed another friend with a pencil. Didn't poke him. Stabbed him.

You now know that he went on from there and if Mr. Conard wants to argue that, surely you are not going to answer those questions yes and give somebody the death sentence because of a just minor cutting up some people when he was twelve or stabbing somebody.

You now know that he didn't stop there. When he was fifteen, he was dating other young people and smoking dope and drinking liquor. You now know when he was fifteen he burglarized a store, a business, broke into it, stole their property. That is a threat to society, ladies and gentlemen.



They took him down to the police and immediately sent him to Waco. You now know that when he got to Waco, Texas, he committed another burglary, a felony crime, another felony crime. You [422] now know that he was violating the law and possessing and carrying a gun when he was fifteen or sixteen or seventeen. Think of that. Fifteen, sixteen, seventeen years old and he is fighting with Tommy Jackson for a gun or he takes a gun to a fight and they take it away from him.

You now know what kind of person he is. He is the type of person who just earlier this year, even though he is on felony probation for which he can go to the penitentiary, takes an axe to his former girlfriend, threatens to whip her ass – pardon my languague [sic].

You now know he is on felony probation and he is instructed that you cannot violate the laws of this State or any other States or the United States, he is smoking dope and goes in and tells his probation officer, "You can't do anything to me." Not exactly his words, but I am paraphrasing. "You can't do anything to me. I smoked dope last night. No sense giving me the urine test." Not once, but two times. And when they get ready to come down on him, he runs back to Colorado City.

You now know that he is the type of person who takes a gun and points it at a young lady who [423] says, "He has been like my brother." And that is against the law to carry a weapon. And he takes that gun and the kids say, "Mama, Dorsie's going to shoot you." What chance, what chance do the kids have if Dorsie Lee Johnson, Jr., is around? They have the chance to learn from Dorsie Lee Johnson Jr., to carry that gun.

But that wasn't it. You now know that he is still carrying that gun again the next week when she comes over to visit his sister and he invites her in. She opens the door and he is sitting there pointing the gun at her. He invited her in, pointing that gun at her. That same day, that same day, three hours later, approximately, she said it was about 11:00 o'clock, he goes into another store and tells you, "We went and told him hold up. I shot him once." The doctor told you where he shot him. Right in the face, right below the eye.

He wasn't through when he shot him in the face, in the eye. Look at State's Exhibit 64 and read his statement. "I shot him once. Then hit him over the head with a wooden handle weeding tool." Broke it over his head and dropped it in that huge pool of Don Burrus' blood. That is what [424] kind of person Dorsie Lee Johnson, Jr., is.

You would think that he satisfied his appetite for blood and death when he laid Jack Huddleston on the floor and put this bullet in his brain, but the very next week – recall, that is March 23rd, 1986 – the very next week what is he doing? He is in Shakey's Pizza Parlor with his gun, a private club. That is a felony. He is in the private club and he chases somebody out of that private club. And it is bad enough that he shoots at the man, but to come back in and laugh and joke. "Ha, you should have seen that man I was shooting at. He had to drive away with his head down." That is what kind of person Dorsie Lee Johnson, Jr., is.

You now know what he is. You now know what is the only just and proper verdict in this case and the only just and proper verdict that can be rendered in this case.



Wednesday in the summation stage of that part of the trial Mr. Conard suggested to you that you not be overcome with emotion, that you decide that case and this case based upon the facts presented before you, based upon the facts presented before [425] you. You now know that he deliberately caused the death of Jack Huddleston and you now know that he going to be and is and remains a threat to society.

Under the evidence the only verdict, the only answers to those special issues is yes.

Thank you.

Argument on behalf of Defendant

THE COURT: Thank you, Mr. Armstrong.

Mr. Conard.

MR. CONARD: May it please the Court, Mr. Armstrong.

Ladies and gentlemen of the Jury, I have to tell you that, first, I feel somewhat anxious or concerned as I stand here before you. This is not something that I have ever done. I don't think any of us have and I don't think any of you have ever been in this particular situation.

I have to – I don't know whether I have put on the right evidence that I should have put on. I don't know that I have asked the right questions, the questions that you may have wanted answered. That is why I am anxious.

It occurs to me that each of you must also be anxious or concerned yourselves because of the [426] extremely

awesome burden and the decision that you are going to have to make in a short while.

Now, I would like to talk to you, first, briefly about the reasons that we have the punishments that we have.

You understand, of course, that Dorsie Johnson is either going to be sentenced to life in prison or he is going to be sentenced to death. One of those two things.

Punishment? The death penalty, the life sentence, both of them are punishment. I recall that I think every one of you, at least most of you, agreed with me in voir dire that a life sentence is a harsh punishment. One reason we punish people with either sentence is for vengence, retribution, to punish for punishment's sake. That may be an appropriate reason.

There is a need for punishment. Very often punishment is concerned with restitution, to make restitution to the victim or the family or whatever. I think each of you sees that nothing either sentence will do will bring back Jack Huddleston. A death sentence is not going to bring back Jack Huddleston. A sentence of life is not [427] going to bring him back. So restitution cannot enter into it.

There is not anything that any of us can do or say that will lighten the burden on Jack Huddleston's family. So, now, you must be concerned with what the evidence shows as the appropriate punishment for Dorsie Johnson for taking Jack Huddleston away from his family.

Rehabilitation is another reason we punish in our Country, in most countries. In other words, we try to apply an appropriate punishment by removing people



from society and putting them in a place where they can correct their actions and beliefs and become useful members of society again. That may or may not happen in this case.

Again, if you sentence Dorsie Johnson to a life sentence, you are instructed not to consider parole. There is never any guarantees of what the future may hold, but, nonetheless, the life sentence is what you must consider under the Court's instructions and under the law.

Now, obviously, a death sentence will not be rehabilitation. So that is not a thing to consider for punishment. You don't rehabilitate some [428] one by killing them.

Another thing I think we talked about in voir dire is deterrence. Many of you thought that a death sentence was a deterrence to crime, that it might stop other people from committing crimes. I think, also, you would agree or most of you do that there are opposing viewpoints to that.

I have read that in England – England used to have something like 172 different crimes that were punishable by the death sentence. One of the crimes was, in fact, pick-pocketing. They hung pick-pockets in England at one time. And, in fact, there were public executions. Everybody could come and gather around in the crowd. Do you know what they discovered when they were hanging a pick-pocket, executing him? They discovered that there were more pick-pockets out in the crowd because that was a convenient place. It did not deter the pick-pockets. They were out performing their trade. So I don't know whether it is a deterrence to other people.

Maybe the problem I have with the idea of deterrence is that it says, let's don't punish him for this crime. Let's punish all the other people [429] out there that might do a crime. I know each of you have agreed with me in voir dire that under our system a person is entitled to be punished only for the crime that he is convicted of, you see?

We are at a particular place in our history, the history of this Country, a Country two hundred years old. I think it is common knowledge that every country and every person looks back to other countries sometimes with criticism and sometimes with praise. For instance, our Country looks back in history at certain – at certain regimes and certain countries with definite criticisms. We look back at Hitler Germany with criticism. His ideas – we do not have to be civilized even – but, yet, at that time that country and that government thought that they were appropriate.

The Romans made great sport of putting the Christians in the coliseum and letting the lions in. They thought that was appropriate and nothing was wrong with it. But, yet, we look back through history at that with revulsion.

It occurs to me that – I wonder what a hundred years or two hundred years from now we will [430] look back on this Country as to sentencing people to death for crimes as to what will people think of it then.

England, the Country that had so many death sentences, finally did away with the death sentence altogether after they hanged a man who was wrongfully accused and after he had been executed, they found out



later it was a mistake. Of course, that is the kind of mistake that cannot be changed.

I am not suggesting that you have made a mistake in convicting Dorsie Johnson. I know that each of you deliberated very seriously on the evidence you heard and it was strong evidence. How can you ignore a confession where the persons says, "I did it. Here is everything spelled out for everything we did. I did it and signed it." How can you ignore that? I understand that.

But, nonetheless, what if he put all of that on paper and it wasn't true? I think each of you can see that the other evidence may not have been as strong as that. What if the things he said to people weren't true? That is just a possibility. I don't know that that would happen, but, anyway, a death sentence cannot be changed; errors cannot [431] be corrected.

You should each realize, and I hope that you do, that this is not a plea for leniency. We are not asking you to let him off. We are not asking you to turn Dorsie loose. None of those things. He is going to be punished, punished. Each of you know that he is going to be punished harshly no matter what.

If he receives a death sentence, there are those that would say his punishment only lasted until he is executed. Then he is freed from the burdens of the world and the punishment. If he receives a life sentence, his punishment will last for a long, long, long time.

You have already heard from the officers from Colorado City that he is charged – I think you can assume that he will be tried for – I think they said he is charged with

attempted capital murder in Colorado City. Of course, he can be punished for that on top of this, you see. So his punishment has begun and will continue from here on. So we are not asking for leniency, if you will, but are asking for the appropriate punishment under the evidence.

[432] Now, as you will all recall, throughout the voir dire, as we talked to each one of you back there several weeks ago, one of the main things we always talked about was the special issues that you would see that basically decide how we set the punishment in a capital case. We talked about those questions that will be asked. You have heard the Judge read them to you. The District Attorney read them to you a moment ago. So I would like to talk to you a little bit about those questions.

As we said in voir dire, deliberate seems to be the key word in that first question. It is the word that, as I recall, most of you had somewhat of a bit of difficulty trying to differentiate between the word intentionally and the word deliberately. And, as we said, if you are trying to decide what deliberately means, that means you have already found him guilty of intentionally committing the murder. So now you have got to decide if his conduct was deliberate. And in deciding that, you should look to the evidence and, again, not – you don't have to believe my argument. You don't have to follow mine because it is not binding upon [433] you. The evidence is all that is binding. The same way with the District Attorney's arguments. You should consider them and, I suggest, both sides. But the evidence is what you must interpret and you must decide from.



You noticed, perhaps, as the Judge read the Charge that there was not a definition for deliberately. And Mr. Armstrong has given you an interpretation of what he believes to be an appropriate definition. I would also like to suggest a definition for you for the way deliberately is applied. Deliberate means thoughtfulness and care in deciding or acting. Thoughtfulness or care. Deliberate is applied to what is done not hastily, but with full realization of what one is doing.

So Mr. Armstrong has already said they drove around and talked about it for a little bit and then went in and did it. That is deliberation, but, under that definition, with full realization of what one is doing.

Now, you notice the Charge – you may not have noticed, but if you will read it again, it tells you that you should consider all of the circumstances, either aggravating or mitigating. [434] Mitigating circumstances are those that indicate that you should be less harsh with your punishment, if you will. That is one way to look at it. They mitigate, lessen the harshness of it.

So as to deliberate, did he have full realization of what he was doing and what the effect would be of what he was doing? You found that he intentionally shot him. That is true. So, now, was it deliberate? Did he have full realization as to what he was doing? So the mitigating circumstances to that might be his age. I don't know that that is all of the mitigation in the case if he should have at the age of nineteen full realization. But the other one you heard – do you remember – first off, you have heard much testimony from several people that he had gotten involved in drugs, the use of marijuana and the use of

cocaine. I would suggest that when people get so involved with the drugs that they cannot contemplate what their actions and what the consequences of their actions is going to be, that they cannot formulate decisions and deliberate with full realization of what they are doing.

You remember Edward Ramshur? His testimony [435] said when Dorsie was telling him all this stuff in jail was that – he said that they had been driving around, smoking marijuana laced with something. So if his mental functions were so impaired because of that that they couldn't really deliberate and realize the wrongness of this conduct, that is something that you should consider in deciding whether or not his actions were deliberate, you see?

Now again, you understand that we are not asking you to turn him loose because he is going to be sentenced to a life term in the penitentiary at the very least.

The statement Dorsie gave also indicates that Amanda is the one that brought the idea of shooting Mr. Huddleston us [sic]. And, in the first place, put the idea in his brain. She is the one that had the gun along. You can consider that, too.

You can consider that, well, maybe he wouldn't have done it had he thought about it or had she not been there. Had he thought about it more, had she not brought it up, that never would have happened. We, of course, we can't go back and change what happened, sad as that may be.

[436] If you find then that because of his mental state or because of the reduction in his mental capacity that he



could not deliberately act with full realization of what his conduct was, then you would answer that special issue no.

Of course, special issue number two is basically the other one that we spent some time on, that being, is there a probability that the Defendant, Dorsie Lee Johnson, Jr., would commit criminal acts of violence that would constitute a continuing threat to society. Again, there are several sections or words in there that are very important in that sentence. You shouldn't read it lightly. You have to break it down. Of course, the first one being probability.

You noticed or you may have noticed as the Judge read the Charge that he didn't define probability for you. Again, that is the word that each of you may have an idea in your own mind what it means and how it would apply in this case. And when we get down to it, that is what is important because, again, you, as the Jury, and each of you individually has to make that decision and apply the evidence to this case, again, weighing the [437] credibility of the evidence as you did on the guilt or innocence phase.

I would suggest that probability, probable means that it is likely to occur or prove true, in all likelihood or very likely, but those terms define probability. You should not, of course, confuse probability with possibility because it doesn't say possibility. It says probability.

Now, as we talked about that question in my interpretation, that means to predict the future, what is going to happen in the future twenty or thirty or forty years down the road. I can't argue – anyone could say what possibly may happen in the future on anything. I can't

tell you that that, as far as possibility goes, that any – you know, anything is possible. You have heard that. But probability, probable is another word entirely. So you have to consider what probability is. That is what you must determine. In other words, is it very likely to occur in the future. And, again, in deciding that, probability, you look to the evidence. You look to the people that testified and what they say.

One thing you can look to is who called them [438] to say what they said.

Now, you will remember that the first few witnesses of Mr. Armstrong for the State on punishment, Rocky Salazar, for instance, even though he had the incident with the broken bottle with Dorsie, when Mr. Armstrong asked him, well, what his reputation was for being a law-abiding citizen in the community in which he lives, he testified it was good. He said, "Even though he cut you with a bottle?" "Yeah, other than that, it was good – he had a good reputation." I didn't hear that question asked again of any more witnesses.

You will also recall that Mr. Johnson said after that and Rocky Salazar said after that that they were still friends. They still ran around together. They went to each other's houses. So whatever happened, it wasn't bad enough in Rock Salazar's mind to end or destroy the relationship that he had with Dorsie Johnson. That is a mitigating factor. That is something to consider. The good reputation is something to consider in looking to what the future may hold.

Fred Dakan testified – when he testified, I thought they were – the injuries were horrible [439] gashes on his



legs. If you look in the school records that were admitted, brought forward by Mr. Uselton, you will see that they characterize them as one – one of them was a scratch and one of them was a cut. That is what the school records and people that saw him at the school characterized them.

Remember Mr. Johnson saw him and talked to him, tried to talk to him and saw that it was a small cut with a small trickle of blood. I am not saying it is right or wrong. I wasn't there. You heard the testimony and, again, it is up to you to weigh the credibility and to decide how it applies in this case and whether or not it really counts towards what he would do in the future now that he has been caught and is going to be punished.

As far as good and bad reputations, you will recall that the only person that testified that Dorsie Johnson had a bad reputation was Fred Dakan's mother. I can understand that she would testify to that since her son had a problem with him.

Look in those school records. He wasn't the greatest student in the world. You heard the testimony about that he was basically regular in [440] attendance. He was there almost all the time when he was supposed to be, except for the time he went to his mother's.

One of the teachers saw and reported directly to Mr. Uselton that they saw improvement in Dorsie and, basically, said that he can do better. He is doing better. Look in the records. They are there. That note is there. One teacher saw hope in Dorsie. We don't know what the others saw because they didn't report it, but that one

thought enough to write a note to the superintendent telling him of improvement.

You will remember Mr. Lowrance, the school principal, that had known Dorsie for some time. He had taught kids for twenty-six years and been in the school system and was well aware that, as I think would be common knowledge, that some kinds give trouble in school, but after they get older, they have straightened up and gone straight and gone right. Others don't get into any trouble and turn out bad later or vice versa.

But despite Mr. Armstrong's attempt to get him to predict how each kid would do, he said, "Well, you can't really tell. You just never know [441] who is going to change for the better or who is going to change for the worse." You never know.

But, you see, that is what you have got to decide in answering special issue number two: Is there a probability that Dorsie will change and did the State prove beyond a reasonable doubt that probability? Because, remember, the burden is still on the State and that burden is still beyond a reasonable doubt. That never lets up. It never lessens, never shifts and it says so in the instructions.

The probation officer from Waco testified that drugs can affect the actions of young people or older people, too. Anybody that gets tangled up with them is going to – it is going to affect their actions and their thought processes and how they do. It is unfortunate and it is a bad thing for our society, but it is there. He testified to that. That is something you can and should consider.



He also agreed that age is something. You will remember he said most of the people he handled were young people and that very often later on as people mature and grew out of their, perhaps, [442] rebelliousness or whatever, immaturity or whatever, that they changed. They were different. They changed.

You will recall the friends of Dorsie, the people that had known him for years, all of his life. Paula Williams, I think she had known him some eight or nine years and had dated him. She didn't like his usage of marijuana and she fussed with him about that and argued with him about that. She recognized that it could do to him and what it would, I suggest, eventually do to him: lead him down the wrong path, brought him nearer to where he is today. It brought misfortune to a lot of people.

But, yet, despite all that, you will remember that Paula Williams told you on the stand that in her opinion, and this is from somebody that had known him and not somebody that had just been around him as a peace officer or for a little while, but somebody that knew him and had been around him a lot and at home and going to parties and whatever, she told you that in her opinion he would not – if he got out of this, this trap of drugs and control from drugs that he was in and [443] was able to spend time in prison that in her opinion he would not commit violent acts in the future.

You see, that is evidence. That is evidence that he would not do it, mitigating evidence, again.

I don't recall hearing anyone testify that in their opinion he would commit violent acts in the future. In fact, you remember Beverly Johnson, the girl that had

known Dorsie all his life, ever since he was a baby? She is just like a sister to him, brothers and sisters. She likewise, even though there had been spats and whatever, she still stayed right with him and she was around him all the time. She is upset about all of this. Naturally, who wouldn't be? But, yet, she still testified, also, that in her opinion from having known Dorsie and having known him all of his life that, first off, if he did it, is what she said, that it would be on account of the drugs, was what she thought, which, again, lessens his mental resistance, if you will. And then she testified in her opinion she knew he would not commit violent acts in the future once he is removed from those drugs, and that he would change his ways if he went to the pen.

[444] That is, again, evidence that is for you to consider, sworn evidence from the stand from somebody that has known him.

She also said that he – in her opinion he was not a bad person.

Now, he is – you look at him. He is a person. He is a human being. That is something you should remember. He is not just a Defendant. He is a human being.

She said he wasn't a bad person, but he has done bad things, but that doesn't mean that he is not a human being and a person.

So he is to be punished for the bad things he has done and not because he is not a person.

Those were really the only people that knew him. The other folks were too little guys from – I guess they



were both down from Houston or Dallas or somewhere. They were at the Pizza Inn.

Then, of course, the police officers that testified to the other – the incident in Colorado City.

So, you see, that is – those are some of the things that you have to consider in deciding probability to commit criminal acts of violence in [445] the future and what you have to consider is the evidence.

Now, you see what the state wants you to consider is basically everything that has gone on before. That is appropriate. You should consider it. But everything that has gone on before is basically – or basically the acts of course of conduct that has already occurred and prior to the time that he is going to receive the punishment that he is going to receive here, you see? So that has happened.

Now, if he is punished, what does the future hold? That is what you have to decide is what does the probability hold? If you are wondering how does he feel about it? Does he feel remorse? Do you remember his daddy testified to that, that he was sorry, that he was remorseful. I suggest that all of these statements show remorse.

He never batted an eye. He started making statements left and right. A person doesn't put out that kind of statement and spill their heart to incriminate themselves that way unless they are remorseful and have a guilty conscience. He laid it out for them and they – you know, they [446] had all they need to put him away right there, and he laid it out for them. I suggest the fact that he did that without saying, "No, I want a lawyer. I'm a

hardened criminal. I want to fight this. I want a lawyer. I am not going to say a word to you." Instead he told them all about it. That shows remorse. That shows that he had a guilty conscience, that he had to get it off his chest, knowing that he was going to be punished, you see?

Now, the other thing in that issue that is important, of course, is one other thing: criminal acts of violence. That phrase, criminal acts of violence, I find it absurd to think that the Legislature when they wrote that law and that statute meant that if you think he is going to go out here and hit somebody in the nose in a fight that you should give him the death sentence instead of a sentence of life. I think that that means that basically that you have to believe that he would probability[sic] commit acts of deadly violence, you see? Again, that is up to you, the Jury to decide. You have to interpret that yourself and how it applies in this case from the evidence.

[447] The other thing in that question – in that question I think several of us talked about it in voir dire, again, is the word society. I remember Mr. Armstrong asked several of you in voir dire if you thought that, well, if he committed and[sic] act in prison, that is society. That is a part of society, isn't it?

I suggest to you that I did at that time – the ones we have talked about that prison is where they remove people from society so they are not any longer a part of society. And I think that word perhaps should have been defined for you as well. But the law doesn't provide that it will be defined for you. It is, again, up to you to decide what society is and how it is used in that sentnece[sic] and as it applies in this case.



Again, I would suggest that definition is a highly structured system of human organization for large-scale community living that normally furnishes protection, continuity, security and a national identity.

Part of society is the furnishing of protection and that is what they are going to do. They are going to protect society from Dorsie Johnson [448] by removing him from society and putting him in the penitentiary. I suggest that that does not ask you to contemplate what he might do or might now do while he is in prison. That is not what that means. Again, it is up to you to decide what that means.

So, basically, you will remember your oath that you are still under that you will a true verdict render in accordance with the law and the evidence. The law, as we have talked about several times, is the Court's Charge that the Court read to you that you will get a copy of, again, to read for yourselves and study again in the Juryroom as you deliberate.

Evidence you have heard, you get to consider the evidence you have heard from the first stage from day one, basically, all the evidence that you have heard.

The punishment phase evidence is, of course, very important because that is the evidence that tells you what your answers should be to question number two, special issue number two. Is that a probability of committing future violence in the – or future – I have misstated it, but you know [449] what I mean: future violence.

You have heard the testimony of people that knew him. That is important. Remember the testimony of his

father, or his daddy. These are things, also, that you can consider. This was evidence from the stand.

You now know instead of just the bad things that he has done – and I dare say that anyone has things in their lives that they have done that they know now were wrong and wish they hadn't done them and all that. I would dare say that very few people would like to have those things dredged up back to the seventh grade. But you heard those things. But you also heard from his daddy and how he was raised, what his family life was like and what his environment was and the problems they had in their family.

You know that he has a background in church, bil li-cal background. His dad is a very wise man, it appears to me. Seems to have had a strong run of catastrophes in his life here in the last few years. But you know that Dorsie Johnson has the background, the religious training that, perhaps, if he is removed from the drugs that he will be [450] able to apply that again in his lifetime in the prison and may be able to put it to good use in prison. I don't know that that many people would have that strong of a Bible background that go to prison. So that is something you should consider in deciding again question number two, the probability of future violence.

If he is able to straighten himself out with that background as his daddy did at age nineteen – of course, he didn't get as far away from the religious path as Dorsie did, but his dad realized finally that that was wrong and straightened himself out. Dorsie has the background to do that, too, if he is in prison.



You will remember that it was after his mother died, after his sister and brother-in-law were horribly murdered by his cousin that he really, I guess you could say, flipped out and started doing these horrible things that you have heard, really bad things. Now, he had done bad things before, I agree, but they were not the kind of things that really hurt people bad. They weren't the kind of things that were criminal acts of violence. And, again, it is not in the past so much, but what he [451] would do in the future. Probability in the future.

So those are things you must consider, what his daddy said and what his life was like and how he did live. Those are things that you are entitled to consider and should consider as mitigating circumstances.

The Charge of the Court points out to you that in answering the special issues – well, I would like to just briefly talk to you about it again. You understand and we have talked about it from day one the punishment, life or death. The Judge tells you that in paragraph two, he basically tells you how to answer the special issues, physically, the procedure of doing it. If all twelve of you unanimously decide that a particular issue, either one or number two, should be answered yes, it takes all twelve of you to decide after having decided that the State proved it beyond a reasonable doubt and considering all of the evidence and, including the mitigating evidence.

Then if all twelve of you agree, then you should answer yes. That is what the instructions tells [sic] you.

Then it tells you if ten or more decide that [452] the State has not proven beyond a reasonable doubt that the answer is yes, then you should vote no to that particular

issue. From that, it is apparent that there is another thing you can tell the Judge. You can tell the Judge if you can't – if ten of you can't vote no or twelve can't vote yes, you can tell the Judge we cannot answer this special issue because ten of us doesn't vote no, but twelve of us don't vote yes. You can tell –

MR. ARMSTRONG: That is a violation of the law and I object.

MR. CONARD: I did not inform them –

MR. ARMSTRONG: I object to him going into that. That is a violation of the law.

THE COURT: Just a minute, gentlemen. Would you approach the bench.

[REPORTER'S NOTE: The following whispered discussion occurred at the bench.]

MR. CONARD: I did not –

THE COURT: In there if they don't answer no, if there is –

[453] MR. CONARD: I just can't tell them the next step. I can't tell them. I am not going to tell them the next step.

MR. ARMSTRONG: I am saying that that is not in the Charge. What he just told them is not –

THE COURT: That is not in the Charge.

MR. ARMSTRONG: He cannot tell them that. The statute doesn't allow it.

MR. CONARD: That is not what it says, Judge. The statute – shall we go –



THE COURT: Let's go in chambers.

[REPORTER'S NOTE: The following discussions occurred in Chambers out of the presence and hearing of the Jury.]

MR. CONARD: The statute says that I cannot tell them the consequences of the failure to agree on the issue. I did not tell them. I did not inform them the effect of the failure of the Jury to answer. That is what it says. I told them that they could answer that they couldn't [454] answer.

THE COURT: "If the Jury returns a negative finding or is unable to answer any special issue, the Court will then sentence the Defendant to the Texas Department of Corrections for life."

MR. CONARD: That is –

THE COURT: Now, "The Court, the Attorney for the State or the Attorney for the Defendant may not inform a Juror or a prospective Juror of the effect of the failure of the Jury to agree on issues submitted under this Article."

MR. CONARD: I didn't tell them what the effect would be. I told them that that is one thing that they can tell the Judge. That does not tell them the effect of failing to answer.

MR. ARMSTRONG: He cannot tell them that they do not have to reach a verdict. That is what he is trying to do.

MR. CONARD: I can tell them that if twelve couldn't vote yes or ten couldn't vote no, I can tell –

MR. ARMSTRONG: They are instructed to either vote yes –

THE COURT: Or no. What you are telling [455] them, Frank, is that they don't have to do that. I never heard that argument before. I think it is a little dangerous, Frank. I don't believe I'd better let you –

MR. CONARD: If I had gone one step further –

THE COURT: It is –

MR. CONARD: – the effect, I would agree

THE COURT: It is pretty close. Of course, it doesn't come out here and say you can't do that, but, like Ernie says, if you are telling them they don't have to answer that, then that is really going against the Charge –

MR. CONARD: I am not –

THE COURT: – as you did –

MR. CONARD: – You don't have to answer, Judge. I am telling them if they can't vote twelve or they can't vote ten –

THE COURT: Well, go ahead the way you are, but don't tell them that you don't have to answer these questions or anything like that.

MR. CONARD: I am not going to tell them that.

THE COURT: Don't say you may not answer [456] that.

MR. ARMSTRONG: He can't tell them that they don't have to answer it.



THE COURT: That is what I am saying.

MR. ARMSTRONG: That is what he is trying to tell them is that they don't have to answer these questions.

THE COURT: Okay. Don't tell them that. I will sustain the objection.

[REPORTER'S NOTE: Court and Counsel then returned into the Juryroom and the following proceedings occurred in the presence and hearing of the Jury.]

THE COURT: All right. You may continue.

MR. CONARD: At any rate, ladies and gentlemen, the Charge is here for you to read and it tells you procedurally how you must answer the questions or what you must do before you can answer the questions and it is here for you to read in paragraph two.

The paragraph three basically tells you what [457] the Court will do, depending on your answers.

Paragraph four talks about, again, some of the things we talked about in voir dire and in opening arguments and all through. The right of the Defendant not to testify. And I call upon you again to not consider for any purpose, as the Charge tells you, the fact that Dorsie Johnson did not testify in this trial.

It also tells you down there at the bottom of the first page that you basically in considering the issues or answering them what you are to consider and that is all of the evidence, whether aggravating or mitigating, you see? So you are to consider all of it, whether to lessen the effect or increase the effect and that goes as to the first

part of the trial or the punishment phase. You should consider and consider appropriately all of it.

In paragraph five you will remember we talked about the law of parties and there was a Charge – a paragraph in the Charge on the guilt-innocence phase that told you about and defined for you what the law of parties was. Basically, if two people go in and do something, they are both responsible [458] for whatever the other one did.

You will see in paragraph five that that does not apply in the punishment phase. It does not apply in this phase in making your decisions and you are not to consider the law of parties. So that is one thing to observe.

And then, of course, the instructions that – you are not to consider, and we talked about this in voir dire, matters not in evidence and that includes and tells you specifically that you are not to discuss the possible action of the parole board or the Governor or any of those things. It is absolutely imperative that the only thing you can consider and use to consider in reaching your decision is the testimony you heard from the stand.

Again, you are told that you are the exclusive judges of the facts. It is up to you to decide the facts, the credibility of the witnesses and the weight to be given to their testimony, but you are bound to receive and follow the law as given you by the Court.

Again, I think the people that knew Dorsie throughout his life can give you their testimony, can give you strong guidance in making your decision.

[459] You have to decide here, basically, the appropriateness of the death penalty in this case; not in cases in



general, but in this case today from what you have heard. In deciding that you should, I think, remember that the family of Jack Huddleston is not the only victim of this thing that Dorsie did. His own family is a victim. His father is a victim. Dorsie is going to be punished.

The question – the real question, I think, is whether you believe that there is a possibility that he can change. You will remember that that was one thing every one of you told me you agreed – every one of you agreed with me that people can change. If you agree that people can change, then that means that Dorsie can change and that takes question two out of the realm of probability and into possibility, you see, because if he can change, then it is no longer probable that he will do these things, but only possible that he can and will do these things, you see.

If people couldn't change, if you could say I know people cannot change, then you could say probably. But every one of you knows in your heart and in your mind that people can and people do [460] change and Dorsie Johnson can change and, therefore, the answer to question two should be no.

The other thing you all told me was that what we have done in the past or a general course of conduct does not absolutely indicate what we will do in the future because people can change.

The state wants you to say, well, here is what his course of conduct was in the past; therefore, it is going to be this way in the future. What he says is he can't change. And you have all said to me on voir dire that people can change.

So then that is not probability, that is possibility and that means an answer of no to question two.

I think that after you have returned your verdict that – and I think it will be a difficult thing for you to do. I think it will require much thought and much study before you return this verdict because the evidence is not as overwhelming and what you have to decide here as it was on the guilt or innocence phase, you see. And now you are asked to speculate and predict the future and that is not as concrete as saying, well, did he do this, which he did.

[461] If Dorsie Johnson gets a death sentence, I may lay awake and wonder at night what did I not do? What did I forget to tell them? What did I forget to present to them that could have convinced them that another human life should not be taken to punish for the loss of Jack Huddleston?

I don't know whether any of you might wonder – might lay awake at night and wonder did we do the right thing? Is this the right thing?

I think that if you recognize that the evidence says that he may change and, therefore, question number two should be answered no and he gets a life sentence in the penitentiary that you can each go out of here knowing that you did the right thing and that you applied the evidence and followed the law and you can sleep soundly and comfortably in your own mind and conscience that you did exactly the right thing.

The Court's instructions tells you to go in, elect a Foreman, begin your deliberations. I would suggest that



in this case, because of the seriousness and the importance and the consequences of what your decision will be, that it might also be appropriate to begin your deliberations with a [462] prayer, whether it is a silent prayer by each one of you or outloud, but that you would need – that you would need the guidance of the Lord in making your decision so that you know that whatever decision you make will be the right decision.

Thank you, ladies and gentlemen.

THE COURT: Thank you, Mr. Conard.

Rebuttal by Texas

Mr. Armstrong.

MR. ARMSTRONG: Your Honor, if it please the Court, Mr. Conard –

MR. CONARD: Mr. Armstrong.

MR. ARMSTRONG: – ladies and gentlemen of the Jury, again I come to you for the last remarks that you will have to endure during this trial.

Now, I agree with Mr. Conard on a couple of matters and then we separate and I no longer agree.

The conduct of Dorsie Lee Johnson, Jr., the reprehensible and repulsive conduct of Dorsie Lee Johnson, Jr., in and of itself brings about an awesome task. I do not agree that it is a difficult task. I am not trying to lessen the struggle that you have with your own feelings nor to say you should lightly go into the Juryroom and flip-[463] pantly return a verdict in this case. But I tell you again each of you, having told this Judge, this Defense Attorney and the representative of the State of Texas, myself, that

you believe and agree with the law of the State of Texas that says in an appropriate case the death penalty is an appropriate punishment, you took an oath to follow the law and there is not – there will not ever be another case where the only appropriate penalty, where the just and proper penalty is a verdict that resulted in a sentence of death to the Defendant than exists in this case based on the evidence that you heard here.

You took an oath that you would uphold the law and you would render your verdict based upon the law, remembering that a man is responsible for the consequences of his own actions and when his own actions result in the killing, the taking of another human life, he has got to face the consequences.

I personally agree with the Legislature, but my feelings are not important or not a guide. But if all we had was one murder, one human being killing another human being with no more, the death penalty [464] might not be appropriate. But that is not what we have here. That is not what we have here.

This wasn't somebody he knew. This wasn't somebody he fought with. This wasn't somebody he argued with. This wasn't somebody who provoked him. This was Jack Huddleston, friendly, helpful husband, father, grandfather. The last two deeds we know that he committed – the last three deeds we know he did was to help a young girl, to be kind to a young girl who was starting her job that day, that morning. She spilled a Coke. "Don't worry about it, Susie. I'll clean it up. You have got your job. You go on."



Valton Buchannan, "See you tomorrow, V.L. Have a good day. Keep smiling."

And then the last thing we know he did was to help a young black girl and a young black man that he had never seen before try to figure out what they needed. "We need some motor oil, transmission fluid." "Sure, it is back over here on the right. What kind of car do you have?"

MR. CONARD: I object to that as injecting facts not in evidence and hearsay facts and I would ask that the Jury be instructed to disregard.

[465] MR. ARMSTRONG: Reasonable inference from the record and from the evidence and the confession of the Defendant as given.

THE COURT: Overruled.

MR. ARMSTRONG: Just part of the ruse, the premeditated, the deliberate actions of Dorsie Johnson. Took advantage of the man that was helping him. "Can't do it out here in the open. Doesn't have his pickup parked in front any more. The police might drive by. Got to get him in the cooler in the back. I want some orange juice and there is none here. I'll take a big jar of orange juice." "Well, sir, I have got to get it in the back."

Deliberate conduct, premeditated, cold-blooded, calculating killer. And he put him on the floor and killed him.

But that is not all we have in this case.

You recall – you may recall from the voir dire that the evidence in the case – of one case might in and of itself be sufficient to warrant the death penalty. I submit that the

manner in which Jack Huddleston was taken, the plan to take him and put him in that cooler, that cold storage unit and kill him showed a calculating, premeditating [466] deliberate killer at work. The kind who shows no remorse and who is able to and is likely to do it again.

In and of itself this crime would allow you, authorize you to answer these two special issues yes. The crime, the murder, the capital murder of Jack Huddleston in and of itself shows that the answers to those questions should be yes. But that is not all we have.

I have got to talk about deliberate for just a moment longer. Mr. Conard says to consider all of the evidence. There may be a reduction in the mental capacity because of drugs. Where is the evidence for you to consider? Where is the doctor who comes in and says that he is operating under diminished capacity?

MR. CONARD: Your Honor, we object to that as a proper argument. It calls for the Jury to speculate on evidence that is not – or facts not in evidence.

MR. ARMSTRONG: I am replying and answering the questions he raised. It is a reply to the Defendant's argument.

THE COURT: All right. This is rebuttal [467] argument so I will overrule the objection.

MR. ARMSTRONG: Thank you, Your Honor. Where is any evidence from the people he was with the next day? Donald Ray Robinson was with him the next day. Was there any evidence of diminished capacity?



First of all, you will recall or you should recall, I would ask you to recall, that even if somebody voluntarily took drugs or voluntarily became intoxicated, that is not a defense. That does not excuse nor make or change the fact that he is guilty of capital murder or lessen the punishment.

MR. CONARD: Your Honor, I object to that statement in that it implies to the Jury that they cannot consider that was a mitigating factor when, in fact, that is the law.

THE COURT: Of course, what he says is true, but the Jury may consider that as a mitigating factor if they wish.

MR. ARMSTRONG: Thank you, Your Honor.

MR. CONARD: Is my objection overruled?

THE COURT: Yes, overruled.

MR. CONARD: Thank you, Your Honor.

[468] MR. ARMSTRONG: Thank you, Your Honor.

Look in the evidence to see if there is any spot in the evidence for what Mr. Conard asked you to examine. There isn't. There is no evidence of that. But is there evidence to the contrary?

Donald Ray Robinson gave evidence that showed there was no mental – reduction in mental capacity. The evidence of Donald Ray Robinson showed that it was calculated, cold-blooded, without remorse.

"You want to see the money I got?" "Where did you get it?" "I robbed Allsup's Convenience Store." Diminished capacity? He remembers it well.

"Hey, man, you're crazy. They're going to identify you." "Ha, ha, ha, ha, dead men can't talk. I took care of that. I am not operating under diminished capacity now. I remember it. I took care of it so he wouldn't identify me. I had purpose and thought going into it. I acted deliberately so he couldn't identify me."

What was the result of that, that deliberate, planned out action on this part in killing Jack Huddleston? They didn't catch him. He got away with it until he tried it again and this time, although he shot the man in the face – think of [469] that for a moment. Stood here and shot the man in the face. His cohort stabbed him in the back and he beat him over the head with a hoe handle. Didn't kill him. Oh, he killed him, but he is not dead. He killed him. He is not dead. He would be better off dead, but that is not the end of it.

You see, he then told the police officers what he did. If he is acting under diminished capacity, he wouldn't be able to calculate and plan and do everything. But he told it with great particularity about what he did and how he did it and why he did it and who was in there and why he – what he did and said to them.

He remember [sic] when V. L. Buchannan came in. He put it in his statement. He remembered when the girls, the two while [sic] girls came in, one of them was drunk. He remembered going out and planning it again and waiting until they got some people out of there. And then if we want to say that he has remorse and that he is



acting out of diminished capacity, when he finally does get arrested, Ed Ramshur gives him the perfect opportunity to say, "Hey, man, I was stoned. I didn't know what I was doing. I'm sorry. I wish I hadn't done that. [470] I wish I was off drugs."

He gave him the perfect opportunity. He said "Dorsie, you had the man's money, you had him helpless, why did you kill him?" Perfect opportunity. All he had to do was say, "Hey, man, I was out of it. I didn't know." That wasn't the reason at all. Just like he told everybody else he did it so he could get away with it and go do it again.

He killed him on purpose, on purpose. No diminished capacity. He deliberately did it.

There are some factors that I think are worth considering in determining deliberateness, but I don't think there is any reason to spend much more time on deliberateness.

I think you knew Tuesday and Wednesday that he acted deliberately. Remember, the same evidence that shows intentional can and often does and in this case absolutely does show deliberateness.

What about the second question then? Mr. Conard wants to change the question. He wants to change the question. He wants you to ask has the State proved beyond a reasonable doubt that Dorsie Johnson cannot change? I want you to look at that [471] question when you go in there. Look at that question and if it asks that, if it asks has the State of Texas proved beyond a reasonable doubt that Dorsie Johnson cannot change, you knock on

that door, give the Bailiff a note and bring it out here and say, "Hey, it does."

Look at that question. Is there a probability that Dorsie Johnson will commit criminal acts of violence that constitute a continuing threat to society?

I submit to you, ladies and gentlemen, the State has already proved – I will back up.

Mr. Conard has already proved that Dorsie Johnson can and has changed –

MR CONARD: Your Honor, I object to that statement as improper argument in that it asks the Jury to apply a burden to the Defendant.

THE COURT: All right. I will sustain the objection.

MR. CONARD: I would ask the Court to instruct the Jury to disregard that argument.

THE COURT: All right. You will disregard the statement made that Mr. Conard is proving something.

[472] MR. CONARD: The Defendant would move for a mistrial, Your Honor.

MR. ARMSTRONG: Judge, if it please the Court –

THE COURT: The motion for mistrial will be denied.

Move on.

MR. ARMSTRONG: Thank you, Your Honor.

I am not asking you to hold any standard to that Defendant. I am merely telling you that the evidence



shows – Mr. Conard brought the evidence; not that he has to – he brought the evidence that shows that Dorsie Johnson has already changed.

I will let my sympathies play a part and I will feel sorry for Mr. Johnson, Sr. He taught that boy or tried to teach that young man what was right and wrong. He taught him, he told me that God gave each of us the ability to make a choice between right and wrong and further taught him that we each have to be responsible. We each are responsible for the consequences of our actions. And in spite of the fact that he took him to church, Dorsie Johnson changed and he has already changed and the State of Texas does not have one bit of [473] burden of proof to prove that he will change or that he will change or that he will not change.

The question is – I will back up.

I will agree that it is possible that he may change. Mr. Conard has asked most all of you, will you agree that it is possible for somebody to change. Would you agree that we cannot predict twenty or forty years down the road what somebody is going to be like? I will agree. I will agree.

How many more Jack Huddlestons, how many more Don Burrus do we have to put in the grave before concluding we can't wait for Dorsie Johnson to change again twenty or forty years from now?

Oh, Mr. Conard says, "You are going to remove him from society." He says, I think, that is what society means in that question number two that would constitute criminal acts of violence that would constitute a continuing

threat to society. You are going to remove him from society by giving him a life sentence. And so you have to answer the question no because he is nto [sic] going to be in society. Therefore, he cannot constitute a threat.

If that were what the law meant, then there is no question. You put him in the penitentiary [474] and under Mr. Conard's theory, you remove him, quote, you remove him from society, you have taken him out of society and put him away so he can't be a threat, if that is all the Legislature meant, then the mandatory sentence would be life.

Society, society may be defined as humans in general taken in relation one to another. he wants you to say that Dorsie Johnson is a human being, but I suppose the other human beings who have written hot checks of sufficient magnitude, who have committed an aggravated assault, who have committed burglary, the kinds of things that Mr. Conard says hasn't hurt anybody, his conduct hasn't hurt anybody, those human beings are going to be exposed to Dorsie Lee Johnson, Jr.

MR. CONARD: Your Honor, I object to that argument as improper in that it is a misstatement and misapplication of the law and that it requests the Jury to contemplate that that sentence and that word refers to persons in prison, in the penitentiary.

THE COURT: This term isn't defined. You have already argued what you think it is and he can argue what he thinks it is. I will overrule [475] the objection.

MR. ARMSTRONG: Thank you, Your Honor.



He said society – something like about society is for protection. I agree with that, too. If it is not protecting of the people who are in the penitentiary, who are paying for their crime as under the laws and the statutes that the Legislature has enacted that they are not entitled to protection, why do we have laws that says it is a crime to harm one of them or for one of them to harm the other one? Why do we have the laws that says it is a capital punishment, a capital punishment to kill a prison guard if they are not entitled to protection from somebody like Dorsie Lee Johnson, Jr.

This man shows no remorse. There is no evidence showing he shows remorse –

MR. CONARD: Your honor, I object to that.

MR. ARMSTRONG: Judge –

MR. CONARD: I am entitled to make my objection.

THE COURT: Let him make his objection.

MR. CONARD: In that it is a direct [476] comment on the failure of the Defendant to testify in this case.

MR. ARMSTRONG: That is absurd.

THE COURT: I don't interpret that the way Mr. Conard does. I will overrule the objection.

MR. ARMSTRONG: Thank you.

You have got all kinds of evidence in here that shows there is no remorse. I grant you that Mr. Johnson got on the stand and with Mr. Conard's leading him said, "yes,

he was sorry," but did you hear the rest of it? He was sorry for making his daddy cry. Never did his daddy say anything about him being sorry for killing Jack Huddleston or Don Burrus. Donald Ray Robinson, again, his testimony shows no remorse. And I want to know how in the world he can say these statements show remorse when they describe in intimate detail how he stretched the man out and killed him.

I see it, ladies and gentlemen, not as somebody spilling his heart, but an unremorseful, totally uncaring person spilling his guts. "I'm the meanest, toughest guy around and I went and killed Don Burrus, too." Oh, yeah, Don Burrus isn't dead, but he might as well be.

[477] Is he going to be a continuing threat to society? Is there a probability? It is not required that the State prove that he will not change. First of all, I don't believe it is possible for me to prove that he will not change because I believe the evidence for the last seven years shows he will not change. But let's bring people in and let's stick them here in groups and let's decide who is more likely to commit continuing acts of violence –

MR. CONARD: Your Honor, I object to that argument as improper Jury argument and invites the Jury to speculate upon facts and testimony and evidence and is not in evidence in this case.

THE COURT: Overruled.

MR. ARMSTRONG: Thank you, Your Honor.

In the first group you are told one of them has a prior criminal record – excuse me.

Would you help me, sir?



[REPORTER'S NOTE: The Bailiff assisted Mr. Armstrong in setting up the blackboard.]

[478] MR. CONARD: Your Honor, may I move so that I can see?

THE COURT: Yes.

MR. ARMSTRONG: Thank you, sir.

One of them has a prior criminal record. Is he more likely to commit other acts of violence in the future? Is he more likely to commit other acts of criminal violence in the future –

MR. CONARD: Your Honor, I object to that as being improper argument in that it asks the Jury to consider facts not in issue and not in evidence in this case.

THE COURT: I don't interpret it that way, Mr. Conard. I will overrule the objection.

MR. ARMSTRONG: Thank you, Your Honor.

The next group comes up and one of them as a bad reputation. Is he more likely to commit criminal acts of violence than those who don't?

Mr. Conard says –

MR. CONARD: I object to that as injecting improper argument and injects facts not in evidence for the Jury's consideration.

THE COURT: Well, if he doesn't tie it in later on, we will take a look at it. I think [479] I know what he is referring to. I don't see him going into anything outside the evidence except inferences and Jury argument. So I will overrule the objection.

MR. ARMSTRONG: Thank you, Your Honor.

Mr. Conard says – well, we will come back to that.

The next group comes in and you are told one of them has done other bad deeds before. He has committed other acts of violence –

MR. CONARD: Objection. That invites the Jury to speculate on facts not in evidence, Your Honor.

THE COURT: Overruled.

MR. ARMSTRONG: Who is more likely out of that group to continue to commit acts of violence.

The next group comes in and you are told that one of them out of that group has a bad temper. Who is more likely to commit acts of violence? Someone with a bad temper –

MR. CONARD: Object to that argument as an improper Jury argument and invites the Jury to speculate on facts not in evidence, Your Honor.

THE COURT: Overruled.

[480] MR. ARMSTRONG: The next group comes in. One of them, you are told, has a bad or an anti=social personality. He may tell somebody that he has dated several years before to do vile sexual acts upon him. Who is more likely to commit criminal acts of violence out of that group?

MR. CONARD: Objection. That is an improper argument and it invites the Jury to speculate on facts not in evidence, Your Honor.



THE COURT: Overruled.

MR. ARMSTRONG: The next group comes in. You are told that one of them shows no remorse for criminal conduct he has engaged in in the past. Who out of that group is more likely to commit continuing acts of violence?

MR. CONARD: Objection. That is an improper jury argument and invites the Jury to speculate on facts not in evidence, Your Honor.

THE COURT: Overruled.

MR. ARMSTRONG: Some of you may now know why my son can't write.

The next group comes in and you are told one of this group is involved with drugs. Who out of the group is more likely to engage in con [481] tinuing acts of criminal violence?

MR. CONARD: Object to the argument as an improper argument and invites the Jury to speculate upon facts not in evidence.

THE COURT: Overruled.

I don't know whether I can see that one, Mr. Armstrong.

MR. ARMSTRONG: I will tell you what it says, Judge.

The next group comes in and you are told that one of that group has previously committed crimes and been given an opportunity to be rehabilitated and has failed to

be rehabilitated in the past. Which one of that group is more likely to commit continuing acts of violence?

MR. CONARD: Object to the argument as improper in that it invites the Jury to speculate on facts not in evidence, Your Honor.

THE COURT: Overruled.

MR. ARMSTRONG: I think you would agree with me that in each of those groups you wouldn't have any difficulty in determining who was more likely to commit continuing acts of violence.

And then if you were told that the same one [482] in each of those groups, the ones that you were told had those traits, you would join me in saying that there is no doubt but that the only answer to number two, special issue number two, the only answer is yes.

Dorsie Johnson has a prior criminal record. Dorsie Johnson has a bad reputation.

First, Mr. Conard said that nobody except Rocky Salazar talked about his reputation. Rocky Salazar said back in school – remember, he said, "You mean at school?" His reputation was yes – his answer was yes. We didn't get into it after that.

Mr. Conard first said that nobody else talked about reputation. That is not true. Mrs. Dakan did. She is the owner of property and a business in Colorado City, Mitchell County, Texas. Yes, she is the mother of another victim of the criminal acts of violence of Dorsie Lee Johnson, Jr.



Paula Williams, you will recall she misunderstood the question. "Do you know his reputation for being a peaceful and law abiding citizen?" "No." "What do you mean no? You told me the other day you knew." "I know it. Don't you [483] remember I laughed when you asked that?" "What do you mean?" "No, he doesn't have a reputation for being peaceful and law abiding." "Oh, you do know his reputation?" "Yes." "And is that reputation good or bad?" "It is bad."

You want to tell me that Beverly Kay Johnson – he didn't ask her what his reputation was? Obviously, she didn't want to be up here. She didn't want to be up here telling the facts. She is going to do whatever she could. Dorsie Lee Johnson has for seven years – I tried to make a note each time one was proven – a whole page of bad acts by Dorsie Lee Johnson, Jr. –

MR. CONARD: Your Honor, I object to the District Attorney displaying his note sheet to the Jury and injecting his personal opinion by doing so to the Jury as improper argument.

THE COURT: I will state for the Jury that what the personal opinion of the District Attorney is is not binding upon you. He is making his argument from what he thinks the evidence shows just like Mr. Conard did. But you will not consider that – any of what Mr. Conard says or Mr. Armstrong says as evidence in this [484] case. They can point out to you what they think is evidence, but you are the sole judge of what the evidence shows.

MR. ARMSTRONG: Thank you, Your Honor.

MR. CONARD: Did the Court sustain my objection?

THE COURT: To that extent, yes.

MR. CONARD: And I move for an instruction to the Jury –

THE COURT: The Court has given that instruction. I just did. They are not to consider anything that the attorneys say as their personal opinions as being facts in this case.

MR. CONARD: I more for a mistrial.

THE COURT: Denied.

MR. ARMSTRONG: You may have made your own list. Does Dorsie Johnson have a bad temper? Ask his own friends. Paula Williams was in fear when, if a fit of temper, he went and grabbed an axe – an axe and threatened her.

Beverly Johnson broke down and started crying when talking about Dorsie Johnson's temper. He turned and threw that rock, a small brick was the way I describe it. It might have been my words, [485] but she agreed.

We talked about anti-social personality. It is involved in his bad temper. It is exhibited by his bad deeds and bad acts.

Recall the testimony of Beverly Kay Johnson about what started Dorsie Johnson into a fit of temper that almost led to an axe whipping.



We have been over no remorse for criminal conduct for any of these crimes – any of these crimes. You make your own list. All of the evidence shows no remorse.

Doyle Lowrance in twenty-six years of school work, "I have never seen this type of aggressive conduct by one student directed toward another student," he said.

What was Dorsie's attitude? Was it remorse? Did Dorsie ever express remorse? No. One involved with drugs. "It is the drug dealers that caused the crimes," says his daddy. That is what some of the evidence shows, but now [sic] always. There is no evidence of drugs when he decided to go get some more money from Don Burrus. And how much money did he get from Don Burrus? They got $25, $30 each. That is how much he values life. Shot him [486] in the face, hit him over the head, stabbed him in the back.

Failed to be rehabilitated in the past. Mr. Conard asked you to send him to the penitentiary where he will be rehabilitated. That is just the opposite of the usual Defense argument. Usually they don't want them in with other criminals because they are going to come out more hardened and more –

MR. CONARD: I object to that argument as improper. It asks for the Jury to consider facts not in evidence.

MR. ARMSTRONG: I am merely responding to his argument.

THE COURT: Yes. This is rebuttal argument. I think it is in response. I will overrule the objection.

MR. ARMSTRONG: Thank you.

His daddy whipped him. Did it do anything good? When he cut Rocky Salazar, did it do any good? No, ma'am. No, sir. He went back and cut Fred Dakan. He went back when he got off probation in the seventh grade and stabbed another friend. What is he going to do when he is through cutting [487] and stabbing his friends? He is going to shoot them in the head. That is what he is going to do.

And he went on to greater things, to burglaries and they caught him. And they said, "Young man, we are going to send you to the penitentiary if you don't rehabilitate. We are going to give you a second chance." And what did he do? He reported under the influence of marijuana to his probation officer, and his probation officer said, "Young man, we are going to give you a third chance." And what did he do? He reported under the influence of marijuana again.

Dorsie Johnson is the one in every group that came into the Courtroom and every time each factor is enough for us to say he is more likely to exhibit continuing acts of violence.

Two more thoughts and I will close. Never believe that when a preacher or a lawyer tells you that. I have got more.

Why should you answer special issue number two yes? That is the reason, but there are two other reasons. Two other reasons. All of his friends through their testimony, a common thread runs through it. He is a danger and you have got [488] to watch out. How can I say that?



Don Johnson, not a very good witness, was in Shakey's Pizza Parlor a week after he had killed Jack Huddleston and Dorsie Came in bragging – doesn't sound remorseful to me – bragging about trying to kill another man, shooting two times at him. Don Johnson, realizing that Dorsie Johnson is a threat, a continuing threat, "I didn't want to stay around and let him shoot me." His testimony, I didn't want to stay around and have him act crazy with me," same thing he said.

One friend. What about Paula Williams? From the time Dorsie Johnson was fifteen she tried to get him to stop taking drugs, take precautions. "You are a danger." What happened when he got mad at her? She took precautions and she stayed in that house. If he wasn't a danger, if he wasn't going to hurt her, why was she afraid and stayed in the house? Dorsie Johnson's friend says the answer to that question is yes.

Beverly Kay, Beverly Kay. She did go outside when he took the axe after Paula. What for? He wasn't mad at Beverly Kay. He was mad at Paula because she wouldn't do something vile and because [489] she wouldn't do something vile with him. And Beverly Kay went out there as a precaution, talked to him, tried to calm him down. Why? Because she knows the answer to that question is yes, there is a likelihood that he will do criminal acts of violence. Beverly Kay knows that the answer should be yes.

But she was in the Weekend Cafe and he got mad at her because she didn't want him smoking his dope and she left because she knew the answer to number two has to be yes. She had to get away, tried to get away and, of

course, she ran from him. Ran back in the house and took the kids back into the house that day she wanted to watch the V.C.R. and Dorsie had the gun.

Under Mr. Conard's questioning, she said the next time she went over there he was still mad at her for – from the Weekend Cafe when he tried to hit her with a brick, with a rock.

He called to her, to Beverly Kay, "Come in the house." And she opened the door and he was standing there with a – or sitting there, I don't recall what it was, with a gun pointed at her and she shut that door and got away because she knew the [490] answer to special issue number two is yes.

What about Donald Ray, Donald Ray Robinson? He helped Beverly Kay get out of that house – I'm sorry – out of that cafe. He put her in that car and after Dorsie had already fired and – not fired, but thrown one big rock at her, he sped off and left him on the side of the road. Why? Because he, too, know the answer to special issue number two is yes.

But the most damaging evidence that compels you to realize what his friends realized was Janet Miles. She got on the stand and said, "I gave my gun to Amanda." And as you sit and contemplate the answer to special issue number two, don't forget her words: "Amanda, don't let Dorsie have the gun," because she knew the answer to special issue number two.

One last thought. Deterrence: Mr. Conard says deterrence is not effective. some of you believe it is. I believe it



is. But whether I believe it is, again, has no value or import –

MR. CONARD: Object to the argument as improper in that the District Attorney has injected his personal opinion for the Jury.

[491] THE COURT: I believe he stated and I will tell the Jury again that his personal opinion is not to enter into your deliberations. You are not bound by that, by either attorney's.

MR. ARMSTRONG: Thank you.

MR. CONARD: Does the Court sustain my objection?

THE COURT: Yes.

MR. CONARD: The Court has instructed the Jury?

THE COURT: I do sustain the objection. I have instructed the Jury as to that.

MR. CONARD: Move for a mistrial. Your Honor.

THE COURT: Denied.

MR. ARMSTRONG: The Legislature has said that deterrence is one reason for punishment. Some of you believe and have said it is a reason for punishment. I want you to think about reverse deterrence. Reverse deterrence. You take away the only just and proper punishment that a case of this nature demands and all you have is a life sentence, the very same sentence given for aggravate [sic] robbery in an appropriate case.

[492] You tell Dorsie Lee Johnson, Jr. and you tell his friends and you tell anybody else of like mind. "If you commit an aggravated robbery and kill the man," you tell them by your verdict, "kill the man that way, you will have a chance of getting away with it and not being punished at all. There will be no witnesses and you will only get the same thing even if they catch you."

Then go tell that to Don Burrus' mother that it is all right. Go tell it to Mike Bailey not to worry about it, even though Dorsie Johnson said to him, "I'm going to get out and when I do, I'll get you."

Ladies and gentlemen, I think you can tell and have seen this week of the immense amount of work in investigation and effort that your law enforcement agencies have put forth to prove a case to you beyond any doubt and it is the Snyder Police Department, the Scurry County Sheriff's Office, the Texas Rangers, the Department of Public Safety, the Colorado City Policy Department and they have done a tremendous amount of work.

They still have one regret, one regret. They regret that they did not catch him before he did [493] it again.

MR. CONARD: Your Honor, I object to that argument as improper in that it asks the Jury to consider facts not in evidence.

MR. ARMSTRONG: It is a plea for law enforcement, Your Honor.

THE COURT: What facts are you referring to?

MR. CONARD: The fact that – what they regretted. There has been no testimony to any regret at all.



MR. ARMSTRONG: That is a reasonable and obvious inference from it.

THE COURT: All right. I think he can argue that. Overruled.

MR. ARMSTRONG: Thank you.

I don't want us to have the same regret while we wait twenty or forty years and count the Jack Huddlestons and Don Burrus and the man, whoever he was, that almost got shot at Shakey's.

Return a verdict, the only verdict, the only just and proper verdict that the law and the evidence requires in this case.

Thank you very much.

* * *

IN THE 132ND JUDICIAL DISTRICT COURT
IN AND FOR
SCURRY COUNTY, TEXAS

| | | |
|---|---|---|
| THE STATE OF TEXAS | * | |
| VS. | * | NO. 5575 |
| DORSIE LEE JOHNSON, JR. | * | |

STATEMENT OF FACTS
PUNISHMENT PHASE EXHIBIT VOLUME

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## PUNISHMENT PHASE EXHIBIT VOLUME

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**DISCIPLINARY REFERRAL**
COLORADO MIDDLE SCHOOL
12th & Chestnut Street
Phone: 728-2673

Johnson, Dorsie — Illegible
7
Date of Incident — Teacher
9-7-79 — Rees

Time
3:20

PARENT OR GUARDIAN NOTIFICATION

The following Report is to notify the parent or guardian that the above student is charged with an infraction of discipline.

Please feel free to request additional information as to the incident or the corrective action taken.

INFRACTION

_ Not reporting after school as directed
_ Unauthorized absence from class
_ No textbook or class materials
_ Chronic class tardiness
✓ Prone to mischief
✓ Disturbing class or other pupils
_ Damaged school property
_ Disrespectful or discourteous
✓ Antagonistic towards class routine

ACTION TAKEN

- Pupil's record examined
- Parental conference
- ✓ Student conference arranged
- ✓ Pupil verbally corrected
- Detained after class or after school
- Guidance Counselor referral
- Assigned different seat
- Parental conference arranged
- Assigned to new class

RECOMMENDATION

- Infraction filed
- Reimbursement for damage allowed
- ✓ Warning issued
- Indefinite Suspension
- Assigned after school time to be made up
- Suspended for ___ days
- Assigned Probationary Status
- Referred to

3 licks given – Lowrance

Comment(s) See attached note

PARENT'S COPY

/s/ Illegible
Authored Signature Title

State Exibit
52

* * *



Colorado Middle School
12th & Chestnut Street
Colorado City, Texas 79512

728-2673

Doyle Lowrance
Principal

Sept. 10, 1979

Mr. & Mrs. Dorsie Johnson
361 Sherman St.
Colorado City, TX 79512

Dear Mr. & Mrs. Johnson:

Dorsie was brought to the office by Mrs. Rees for giving the "finger" in class. This is just one of the many problems teachers are having with Dorsie in class. On 9-4-79, he gave trouble to a substitute teacher in Language Arts. On the same day, he was brought to the office by Mrs. Ress. (A report of this visit was mailed home). On 9-5-79, Dorsie was observed cutting line in the cafeteria. He was the only student doing so. I sent Dorsie to the end of the line. On 9-6-79, Dorsie was observed running from the main building to the cafeteria. He was again sent to the end of the line. (This incident involved some 5 or 6 boys).

These incidents along with others reported by teachers, are leading to a very serious problem. If Dorsie continues to act in this way, it will lead to suspension from class privileges.

Please feel free to call or come to school to discuss in greater details, these problems.

Cordially yours,

/s/ Doyle Lowrance
Doyle Lowrance
Principal

cc/ Charlie Uselton
Superintendent of Schools

**DISCIPLINARY REFERRAL**
COLORADO MIDDLE SCHOOL
12th & Chestnut Street
Phone: 728-2673

Johnson, Dorsie

Illegible
7

Date of Incident
9-17-79

Date
9-18-79

Time

Teacher
Coach Gainey

PARENT OR GUARDIAN NOTIFICATION

The following Report is to notify the parent or guardian that the above student is charged with an infraction of discipline.

Please feel free to request additional information as to the incident or the corrective action taken.

INFRACTION

_ Not reporting after school as directed
_ Unauthorized absence from class
_ No textbook or class materials
_ Chronic class tardiness
_ Prone to mischief
_ Disturbing class or other pupils
_ Damaged school property
_ Disrespectful or discourteous
_ Antagonistic towards class routine
_ Illegible



ACTION TAKEN

_ Pupil's record examined
_ Parental conference
_ Student conference arranged
_ Pupil verbally corrected
_ Detained after class or after school
_ Guidance Counselor referral
_ Assigned different seat
_ Parental conference arranged
_ Assigned to new class

RECOMMENDATION

_ Infraction filed
_ Reimbursement for damage allowed
_ Warning issued
_ Indefinite Suspension
_ Assigned after school time to be made up
_ Suspended for ___ days
_ Assigned Probationary Status
_ Referred to _____

Comment(s) See Attached Letter

Illegible

TEACHER'S COPY
/s/ Doyle Lowrance
Authored Signature Title

**DISCIPLINARY REFERRAL**
COLORADO MIDDLE SCHOOL
12th & Chestnut Street
Phone: 728-2673

Johnson, Dorsie

Illegible
Date

Date of Incident
10-10-79

Teacher
Brown

Time
1:55

PARENT OR GUARDIAN NOTIFICATION

The following Report is to notify the parent or guardian that the above student is charged with an infraction of discipline.

Please feel free to request additional information as to the incident or the corrective action taken.

INFRACTION

_ Not reporting after school as directed
_ Unauthorized absence from class
_ No textbook or class materials
_ Chronic class tardiness
_ Prone to mischief
_ Disturbing class or other pupils
_ Damaged school property
_ Disrespectful or discourteous
_ Antagonistic towards class routine
_ Illegible



ACTION TAKEN

_ Pupil's record examined
_ Parental conference
_ Student conference arranged
_ Pupil verbally corrected
_ Detained after class or after school
_ Guidance Counselor referral
_ Assigned different seat
_ Parental conference arranged
_ Assigned to new class

RECOMMENDATION

_ Infraction filed
_ Reimbursement for damage allowed
_ Warning issued
_ Indefinite Suspension
_ Assigned after school time to be made up
_ Suspended for ___ days
_ Assigned Probationary Status
_ Referred to _____

Comment(s) Dosie stabbed Dennis Illegible in the hand with a pencil. He made a stabbing motion at his stomach and then stabbed him in the hand. Dorsey said it was an accident.

TEACHER'S COPY

/s/ Doyle Lowrance Prin.
Authored Signature Title

Date: 9-17-79

Coach Gainey called me at home at about 8:30 p.m. He told me about Dorsie cutting Rocky Salazar with a piece of glass. The incident took place before workout on the morning of 9-17-79. Rocky didn't tell Coach Gainey what happened until his sister brought him to Coach Gainey that afternoon. Rocky went to the hospital and had the cut sewed up. (Rocky didn't know how many stitches were needed).

Date 9-18-79 (7:45 a.m.)

I talked to Rocky early this morning about the problem. Rocky told me that Dorsie told him that he was going to cut him and he did cut Rocky on the back with a piece of broken glass. Rocky didn't tell Coach Gainey what happened because Dorsie told him he would cut him again.

(9:20 a.m.)

I talked to Coach Gainey about the problem. He said that Dorsie admitted that he did cut Rocky. Coach Gainey gave Dorsie three licks for conduct that is totally unacceptable by an athlete or by any student at CMS. I told Coach to send Dorsie and Rocky to my office as soon as they were dressed.

(9:30 a.m.)

Gary Marsh told me that he had seen Dorsie cut Rocky on the back. He didn't hear anything and he doesn't know why.

Dorsie told me that he was just playing and he didn't mean to cut Rocky but that it was an accident.

Rocky said again that Dorsie grabbed him by the shirt and told him he was going to cut him. He then cut Rocky through the shirt on the back of his left shoulder.



Action taken:

Dorsie is suspended for a period of three days. He will be allowed to return to school on 9-22-79 at 9:30 a.m.

Possible action for future problems:

1. Additional three day suspensions
2. Suspension for the current semester (this would be done by School Board action).

/s/ Doyle Lowrance
Doyle Lowrance
Principal
Middle School
Colorado City, TX

Colorado Middle School
12th & Chestnut Street
Colorado City, Texas 79512

728-2673

Doyle Lowrance
Principal Sept. 21, 1979

Mr. Dorsie Johnson
361 Sherman St.
Colorado City, TX 79512

Dear Mr. Johnson:

The following is a summary of the conference held on September 21, 1979, concerning Dorsie's problems at Colorado Middle School.

Items discussed:

1. Lack of homework
2. Behavior problems
3. Improvement that must be made by Dorsie

Recommendations:

1. Dorsie will be allowed to return to school for a probation period that will end on October 10, 1979.
2. Dorsie must prove, by his efforts and actions that improvement is evident.
3. A current report will be discussed on October 10, 1979, at 10:00 a.m. at a meeting in Mr. Uselton's office.
4. The probation will be removed at that time if an acceptable report is given.
5. Dorsie's effort and behavior at school must continue past this probationary period to insure continued enrollment in school.

Possible future action:

1. Automatic suspension if Dorsie is sent to the Principal's office for any reason before October 10, 1979.
2. Suspension for a period of time not to exceed the current semester.
3. Suspension from school.

Cordially,
/s/ Doyle Lowrance
Doyle Lowrance
Principal



Colorado Middle School
12th & Chestnut Street
Colorado City, Texas 79512

728-2673

Doyle Lowrance
Principal

To: Mr. Uselton
Superintendent of Schools
Colorado City
and
Mr. Johnson

Report on: Dorsie Johnson

September 25, 1979 12:50 p.m.

Edward Cannon came to my office and reported that Dorsie had pushed him and caused him to stumble, down three or four steps in the main building. Edward complained of a hurt thumb and knee that he hit on one of the steps. I checked and found three witnesses that said they saw Dorsie push Edward. The witnesses were Treva Russell, Johnny Martinez, and Dennis Pfeuffer.

I got Dorsie out of class and brought him to the office. Edward changed his story and said he was not absolutely sure that Dorsie was the one that pushed him. When Edward made this statement the students were dismissed and sent back to class.

September 25, 1979 3:25 p.m.

Dorsie was set to my office by Mrs. Rees for misbehavior in class. I talked to Dorsie a few minutes, looked at the note and test paper that Mrs. Rees sent over, and then dismissed him so he would not miss the bus. Dorsie told

me he was giggling in class but it was not his fault. He said some of his classmates made him giggle.

No decision was made at this time in order to give me a chance to talk to Mrs. Rees in detail about the problem. At 3:35, Mrs. Rees came over to my office and we discussed the situation.

Mrs. Rees had told Dorsie to leave the room and come to my office at about 3:10. The reason for this was that the class was taking a test and Mrs. Rees could not leave them alone. Dorsie had been giggling throughout the first part of the test and had answered one question in the first thirty minutes of class. Dorsie did not come to my office at this time but simply walked out in the hall out of sight of Mrs. Rees. Mrs. Gierhart, a teacher in the next room, had to step out in the hall and tell Dorsie to get quiet. Mrs. Rees then found out that Dorsie had not come to my office as directed and at this time, he was told again to come to the office which he did.

Mrs. Rees explained the part about the classmate that had made a funny remark at the beginning of the class at 2:45. This student was sent to the hallway to complete the test at about 2:55.

Dorsie was not sent to the office until about 3:10 after he continued to do nothing but giggle throughout the test.

Mrs. Rees also said that the giggling had been somewhat a problem all along and had not improved since his return to class on 9-21-79.

The teachers were not aware of the probationary status of Dorsie. They were not told because I felt this would not allow for a normal situation to exist. Dorsie was aware of



the situation and knew what was expected of him at all times.

/s/ Doyle Lowrance
Principal
Colorado Middle School

Dorsey suspended until 10:00, October 10, 1979

Colorado Middle School
12th & Chestnut Street
Colorado City, Texas 79512

728-2673

Doyle Lowrance
Principal

APRIL 3, 1980

Conference with Dorsie Johnson, Fred Dakan, Weldon Hartsfield, Coach Welch, Coach Zamarippa

The conference concerned the problem that occurred on the afternoon of April 2, 1980, during cross-country running.

Dorsie, Fred and Weldon were together on the service road next to I-20. Fred said that the three were walking together and he said something about his legs hurt. He said Dorsie told him he could help the hurting and made a swipe at the back of Fred's legs with a piece of glass. It made a scratch on the left leg and cut the right leg.

Dorsie confirmed Fred's statements but said he was only playing. He also said that others were picking up glass along the road.

Weldon said that he saw Dorsie cut Fred but did not hear Dorsie or Fred say anything.

I suspended Dorsie for nine days until April 17, 1980.

/s/ Doyle Lowrance
DOYLE LOWRANCE

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No. 5575

| | | |
|---|---|---|
| THE STATE OF TEXAS | § | IN THE 132ND |
| | § | JUDICIAL |
| VS. | § | |
| | § | DISTRICT COURT OF |
| DORSIE LEE JOHNSON, JR. | § | |
| | § | SCURRY COUNTY, |
| | § | TEXAS |

DEFENDANT'S OBJECTION NUMBER 1

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Defendant, Dorsie Lee Johnson, Jr., in the above-styled and numbered cause, after the evidence having been heard and both sides having closed, and the Court having prepared and submitted the Charge to the Defendant for examination and prior to the reading of said Charge to the jury and arguments of counsel to the jury, the Defendant hereby files this his Objection to said Charge:

> The evidence is insufficient to support the submission of special issue number 1 and special issue number 2.

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully prays that this Court sustain this Objection and amend the Court's Charge accordingly.

Respectfully submitted,

/s/ Frank Conard, II
Frank W. Conard, II
121 East Third
Sweetwater, Texas 79556
(915) 236-6864
State Bar No. 04655700

ATTORNEY FOR DEFENDANT

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No. 5575

| | | |
|---|---|---|
| THE STATE OF TEXAS | § | IN THE 132ND |
| | § | JUDICIAL |
| VS. | § | |
| | § | DISTRICT COURT OF |
| DORSIE LEE JOHNSON, JR. | § | |
| | § | SCURRY COUNTY, |
| | § | TEXAS |

ORDER

On this day, the Defendant having properly and timely filed his Objection Number 1 to the Court's Charge before the Court's Charge was read to the jury and before arguments of counsel, the Defendant's Objection 1 to the Court's Charge and is hereby (~~GRANTED~~) (DENIED, to which action of the Court the Defendant duly excepts in writing in open Court prior to the reading of the Main Charge to the jury).

SIGNED AND ENTERED this the 14 day of Nov., 1986.

/s/ George L. Duling
Judge Presiding

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No. 5575

| | | |
|---|---|---|
| THE STATE OF TEXAS | § | IN THE 132ND |
| | § | JUDICIAL |
| VS. | § | |
| | § | DISTRICT COURT OF |
| DORSIE LEE JOHNSON, JR. | § | |
| | § | SCURRY COUNTY, |
| | § | TEXAS |

DEFENDANT'S OBJECTION NUMBER 2
AND SPECIALLY REQUESTED
INSTRUCTION NUMBER 2

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Defendant, Dorsie Lee Johnson, Jr., in the above-styled and numbered cause, after the evidence having been heard and both sides having closed, and the Court having prepared and submitted the Charge to the Defendant for examination and prior to the reading of said Charge to the jury and arguments of counsel to the jury, the Defendant hereby files this his Objection to said Charge:

> First objection to Special Issue #2 in the Court's Charge in that such charge does not require the jury to base their decision on felony crimes, aggravated crimes, or deadly crimes.
>
> Second objection to Special Issue #2 in the Court's Charge in that as worded such special issue invites the jury to speculate as to the length of time the defendant would spend in jail on a life sentence before parole.

The Defendant specially requests that the following instruction be submitted in the Charge of the Court:

Requested submission in place of Special Issue #2 as set out in the Court's charge as follows:

2.

(a) Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing, *deadly* threat to society.

Answer: ___ Yes or ___ No

(b) Whether the aggravating circumstances outweigh the mitigating circumstances so as to render improbable that the defendant can be rehabilitated?

Answer: ___ Yes or ___ No

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully prays that this Court include the foregoing Specially Requested Instruction in the Court's Main Charge and sustain this Objection and amend the Court's Charge accordingly.

Respectfully submitted,

/s/ Frank Conard, II
Frank W. Conard, II
121 East Third
Sweetwater, Texas 79556
(915) 236-6864
State Bar No. 04655700

ATTORNEY FOR DEFENDANT

---



No. 5575

| | | |
|---|---|---|
| THE STATE OF TEXAS | § | IN THE 132ND |
| VS. | § | JUDICIAL |
| | § | |
| DORSIE LEE JOHNSON, JR. | § | DISTRICT COURT OF |
| | § | |
| | § | SCURRY COUNTY, TEXAS |

ORDER

On this day, the Defendant having properly and timely filed his Objection to the Court's Charge Number 2 and Request for Special Instructions Number 2 before the Court's Charge was read to the jury and before arguments of counsel, the Defendant's Objection to the Court's Charge and Request for Special Instructions is hereby (~~GRANTED~~) (DENIED, to which action of the Court the Defendant duly excepts in writing in open Court prior to the reading of the Main Charge to the jury).

SIGNED AND ENTERED this the 14 day of Nov., 1986.

/s/ George L. Duling
Judge Presiding

---

No. 5575

| | | |
|---|---|---|
| THE STATE OF TEXAS | § | IN THE 132ND |
| | § | JUDICIAL |
| VS. | § | |
| | § | DISTRICT COURT OF |
| DORSIE LEE JOHNSON, | § | |
| JR. | § | SCURRY COUNTY, |
| | § | TEXAS |

DEFENDANT'S OBJECTION NUMBER 3
AND SPECIALLY REQUESTED
INSTRUCTION NUMBER 3

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Defendant, Dorsie Lee Johnson, Jr., in the above-styled and numbered cause, after the evidence having been heard and both sides having closed, and the Court having prepared and submitted the Charge to the Defendant for examination and prior to the reading of said Charge to the jury and arguments of counsel to the jury, the Defendant hereby files this his Objection to said Charge:

> Objection to the Court's Charge on the grounds that it in effect instructs the jury as to consideration of the State's evidence, but fails to provide instruction as to mitigating evidence and as such is a comment by the Court on the weight of the evidence.

The Defendant specially requests that the following instruction be submitted in the Charge of the Court:

> "You may take into consideration all of the evidence, whether aggravating or mitigating in nature, if any, submitted to you in the full trial of the case, that is, all of the evidence submitted



> to you in the trial of the first part of this case wherein you were called upon to determine the guilt or innocence of the defendant, and all of the evidence, whether mitigating or aggravating in nature, if any, admitted before you in the second part of the trial wherein you are called upon to determine the special issues hereby submitted to you."

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully prays that this Court include the foregoing Specially Requested Instruction in the Court's Main Charge and sustain this Objection and amend the Court's Charge accordingly.

Respectfully submitted,

/s/ Frank Conard, II
Frank W. Conard, II
121 East Third
Sweetwater, Texas 79556
(915) 236-6864
State Bar No. 04655700

ATTORNEY FOR DEFENDANT

No. 5575

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| THE STATE OF TEXAS | § | IN THE 132ND |
| | § | JUDICIAL |
| VS. | § | |
| | § | DISTRICT COURT OF |
| DORSIE LEE JOHNSON, JR. | § | |
| | § | SCURRY COUNTY, |
| | § | TEXAS |

ORDER

On this day, the Defendant having properly and timely filed his Objection to the Court's Charge Number 3 and Request for Special Instructions Number 3 before the Court's Charge was read to the jury and before arguments of counsel, the Defendant's Objection to the Court's Charge and Request for Special Instructions is hereby (GRANTED) as amended (~~DENIED~~, to which action of the Court the Defendant duly excepts in writing in open Court prior to the reading of the Main Charge to the jury).

SIGNED AND ENTERED this the 14 day of Nov., 1986.

/s/ George L. Duling
Judge Presiding

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No. 5575

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| THE STATE OF TEXAS | § | IN THE 132ND |
| | § | JUDICIAL |
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| | § | DISTRICT COURT OF |
| DORSIE LEE JOHNSON, JR. | § | |
| | § | SCURRY COUNTY, |
| | § | TEXAS |

DEFENDANT'S OBJECTION NUMBER 4
AND SPECIALLY REQUESTED
INSTRUCTION NUMBER 4

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Defendant, Dorsie Lee Johnson, Jr., in the above-styled and numbered cause, after the evidence having been heard and both sides having closed, and the Court having prepared and submitted the Charge to the Defendant for examination and prior to the reading of said Charge to the jury and arguments of counsel to the jury, the Defendant hereby files this his Objection to said Charge:

> The Charge fails to include the following instruction:
>
> "The jury is instructed that *only the conduct of the defendant* can be considered at the punishment phase, and that the instructions pertaining to the law of parties given at the guilt stage cannot be considered."

The Defendant specially requests that the following instruction be submitted in the Charge of the Court:

> The jury is instructed that *only the conduct of the defendant* can be considered at the punishment phase, and that the instructions pertaining to

the law of parties given at the guilt stage cannot be considered.

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully prays that this Court include the foregoing Specially Requested Instruction in the Court's Main Charge and sustain this Objection and amend the Court's Charge accordingly.

Respectfully submitted,

/s/ Frank Conard, II
Frank W. Conard, II
121 East Third
Sweetwater, Texas 79556
(915) 236-6864
State Bar No. 04655700

ATTORNEY FOR DEFENDANT



No. 5575

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| THE STATE OF TEXAS | § | IN THE 132ND |
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| DORSIE LEE JOHNSON, JR. | § | DISTRICT COURT OF |
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| | § | SCURRY COUNTY, |
| | § | TEXAS |

ORDER

On this day, the Defendant having properly and timely filed his Objection to the Court's Charge Number 4 and Request for Special Instructions Number 4 before the Court's Charge was read to the jury and before arguments of counsel, the Defendant's Objection to the Court's Charge and Request for Special Instructions is hereby (GRANTED) (~~DENIED~~, to which action of the Court the Defendant duly excepts in writing in open Court prior to the reading of the Main Charge to the jury).

SIGNED AND ENTERED this the 14 day of Nov., 1986.

/s/ George L. Duling
Judge Presiding

No. 5575

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| THE STATE OF TEXAS | § | IN THE 132ND |
| | § | JUDICIAL |
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| | § | DISTRICT COURT OF |
| DORSIE LEE JOHNSON, JR. | § | |
| | § | SCURRY COUNTY, |
| | § | TEXAS |

DEFENDANT'S OBJECTION NUMBER 5
AND SPECIALLY REQUESTED
INSTRUCTION NUMBER 5

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Defendant, Dorsie Lee Johnson, Jr., in the above-styled and numbered cause, after the evidence having been heard and both sides having closed, and the Court having prepared and submitted the Charge to the Defendant for examination and prior to the reading of said Charge to the jury and arguments of counsel to the jury, the Defendant hereby files this his Objection to said Charge:

> Objection to the Court's charge in that it fails to define "deliberately," having already defined "intentionally", the two words being synonyms in common useage, thereby allowing the jury to answer special issue number one without reflecting on any difference there may be in the two words as used in the charge, and as such constitutes a comment by the Court on the weight of the evidence.

The Defendant specially requests that the following instruction be submitted in the Charge of the Court:



> (1) As used in the first special issue, the word "deliberately" has a meaning different and distinct from the word "intentionally" as that word was previously defined in the charge on guilt, and
>
> (2) The word "deliberately" as used in the first special issue means a manner of doing an act characterized by or resulting from careful consideration: "A conscious decision involving a thought process, conduct which embraces more than mere will to engage in the conduct."

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully prays that this Court include the foregoing Specially Requested Instruction in the Court's Main Charge and sustain this Objection and amend the Court's Charge accordingly.

Respectfully submitted,

/s/ Frank Conard, II
Frank W. Conard, II
121 East Third
Sweetwater, Texas 79556
(915) 236-6864
State Bar No. 04655700

ATTORNEY FOR DEFENDANT

No. 5575

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| | § | DISTRICT COURT OF |
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| | § | SCURRY COUNTY, |
| | § | TEXAS |

ORDER

On this day, the Defendant having properly and timely filed his Objection to the Court's Charge Number 5 and Request for Special Instructions Number 5 before the Court's Charge was read to the jury and before arguments of counsel, the Defendant's Objection to the Court's Charge and Request for Special Instructions is hereby (~~GRANTED~~) (DENIED, to which action of the Court the Defendant duly excepts in writing in open Court prior to the reading of the Main Charge to the jury).

SIGNED AND ENTERED this the 14 day of Nov., 1986.

/s/ George L. Duling
Judge Presiding



No. 5575

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| THE STATE OF TEXAS | § | IN THE 132ND |
| | § | JUDICIAL |
| VS. | § | |
| | § | DISTRICT COURT OF |
| DORSIE LEE JOHNSON, JR. | § | |
| | § | SCURRY COUNTY, |
| | § | TEXAS |

DEFENDANT'S OBJECTION NUMBER 6

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Defendant, Dorsie Lee Johnson, Jr., in the above-styled and numbered cause, after the evidence having been heard and both sides having closed, and the Court having prepared and submitted the Charge to the Defendant for examination and prior to the reading of said Charge to the jury and arguments of counsel to the jury, the Defendant hereby files this his Objection to said Charge:

> Objection to the submission of the verdict form permitting jury to assess the death penalty because under the facts of the particular case, said punishment would be cruel and unusual and excessive punishment, in violation of the Texas Constitution and the Constitution of the United States.

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully prays that this Court sustain this Objection and amend the Court's Charge accordingly.

Respectfully submitted,

/s/ Frank Conard, II
Frank W. Conard, II
121 East Third
Sweetwater, Texas 79556
(915) 236-6864
State Bar No. 04655700

ATTORNEY FOR DEFENDANT

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No. 5575

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| THE STATE OF TEXAS | § | IN THE 132ND |
| VS. | § | JUDICIAL |
| | § | |
| DORSIE LEE JOHNSON, JR. | § | DISTRICT COURT OF |
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| | § | SCURRY COUNTY, |
| | § | TEXAS |

ORDER

On this day, the Defendant having properly and timely filed his Objection Number 6 to the Court's Charge before the Court's Charge was read to the jury and before arguments of counsel, the Defendant's Objection to the Court's Charge and Request for Special Instructions is hereby (~~GRANTED~~) (DENIED, to which action of the Court the Defendant duly excepts in writing in open Court prior to the reading of the Main Charge to the jury).

SIGNED AND ENTERED this the 14 day of Nov., 1986.

/s/ George L. Duling
Judge Presiding

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No. 5575

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| THE STATE OF TEXAS | § | IN THE 132ND |
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| VS. | § | |
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| | § | SCURRY COUNTY, |
| | § | TEXAS |

DEFENDANT'S OBJECTION NUMBER 7

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Defendant, Dorsie Lee Johnson, Jr., in the above-styled and numbered cause, after the evidence having been heard and both sides having closed, and the Court having prepared and submitted the Charge to the Defendant for examination and prior to the reading of said Charge to the jury and arguments of counsel to the jury, the Defendant hereby files this his Objection to said Charge:

> Objection to the Charge of the Court in that the Charge fails to contain special issue number 3 as set forth in Article 37.071 of the Texas Code of Criminal Procedure as follows:
>
> "If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, in any, by the deceased."
>
> The failure to include such charge does not allow the jury to determine the evidence raised, if any.



WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully prays that this Court sustain this Objection and amend the Court's Charge accordingly.

Respectfully submitted,

/s/ Frank Conard, II
Frank W. Conard, II
121 East Third
Sweetwater, Texas 79556
(915) 236-6864
State Bar No. 04655700

ATTORNEY FOR DEFENDANT

No. 5575

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| THE STATE OF TEXAS | § | IN THE 132ND |
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| | § | DISTRICT COURT OF |
| DORSIE LEE JOHNSON, JR. | § | |
| | § | SCURRY COUNTY, |
| | § | TEXAS |

ORDER

On this day, the Defendant having properly and timely filed his Objection Number 1 to the Court's Charge before the Court's Charge was read to the jury and before arguments of counsel, the Defendant's Objection 1 to the Court's Charge and Request for Special Instructions is hereby (~~GRANTED~~) (DENIED, to which action of the Court the Defendant duly excepts in writing in open Court prior to the reading of the Main Charge to the jury).

SIGNED AND ENTERED this the 14 day of Nov., 1986.

/s/ George L. Duling
Judge Presiding



NO. 5575

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| THE STATE OF TEXAS | § | IN THE 132ND |
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| | § | TEXAS |

CHARGE OF THE COURT

MEMBERS OF THE JURY:

You have found the Defendant, Dorsie Lee Johnson, Jr., guilty of capital murder committed on the 23rd day of March, 1986, in Scurry County, Texas. It is now necessary for you to determine from all the evidence presented the answers to Special Issues in this charge. You are further instructed that:

1

The punishment for capital murder is mandatory and is either life in prison or death.

2

The burden of proof in this part of the trial rests on the State and never shifts to the Defendant. Each issue submitted to you must be proven beyond a reasonable doubt before it can be answered "yes". If the jury unanimously determines that the State has proven an issue beyond a reasonable doubt, then the Foreman shall

record the jury's answer by signing his name to that answer on the verdict form.

You are further instructed that if any juror, after considering the evidence and these instructions, has a reasonable doubt as to whether the answer to a Special Issue should be "yes", then such juror should vote "no" to that Special Issue.

If ten (10) or more jurors vote "no" to any Special Issue, then the answer of the jury shall be "no" to that issue and the Foreman shall so record the jury's answer by signing his name to the verdict form reflecting such answer.

3

You are further instructed that if the jury returns affirmative or "yes" answer to all the Issues submitted, this Court shall sentence the Defendant to death. If the jury returns a negative or "no" answer to any Issue submitted, the Court shall sentence the Defendant to life in prison.

4

You are instructed that the Defendant may testify in his own behalf if he chooses to do so, but if he elects not to do so, that fact cannot be taken by you as a circumstance or evidence against him or prejudice him in any way. The Defendant has elected not to testify in either stage of the trial, and you are instructed that you cannot and must not refer to, allude to, or consider that fact for any purpose during your deliberations.



In determining each of these Issues, you may take into consideration all the evidence submitted to you in the trial of this case, whether aggravating or mitigating in nature, that is, all the evidence in the first part of the trial when you were called upon to determine the guilt or innocence of the Defendant and all the evidence, if any, in the second part of the trial wherein you are called upon to determine the answers to the Special Issues.

5

The jury is instructed that only the conduct of the Defendant can be considered at the punishment phase, and that the instructions pertaining to the law of parties given at the guilt stage cannot be considered.

6

During your deliberations you must not discuss nor relate any matters not in evidence before you. You should not consider nor mention any personal knowledge or information you may have about the fact or person connected with this case not presented by the evidence.

During your deliberations you are not to consider or discuss any possible action of the Board of Pardons and Paroles or of the Governor, or how long the defendant would be required to serve to satisfy a sentence of life imprisonment.

You are the exclusive judges of the facts proved and the credibility of the witnesses and the weight to be given

to their testimony, but you are bound to receive and follow the law as given you by the Court.

/s/ Gene L. Dulaney
Gene L. Dulaney
Judge
132nd District Court

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NO. 5575

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The Special Issues with a signature line for your Foreman to indicate your answers:

SPECIAL ISSUE ONE

Was the conduct of the Defendant, Dorsie Lee Johnson, Jr., that caused the death of the deceased, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?



ANSWER TO SPECIAL ISSUE ONE

We, the jury, unanimously find and determine beyond a reasonable doubt that the answer to Special Issue One is "yes".

/s/ R. E. Barbee
Foreman of the Jury

OR

We, the jury, find and determine that the answer to Special Issue One is "No" because at least ten (10) jurors have a reasonable doubt about the matter inquired about.

---
Foreman of the Jury

SPECIAL ISSUE TWO

Is there a probability that the Defendant, Dorsie Lee Johnson, Jr., would commit criminal acts of violence that would constitute a continuing threat to society?

ANSWER TO SPECIAL ISSUE TWO

We, the jury, unanimously find and determine beyond a reasonable doubt that the answer to Special Two is "yes".

/s/ R. E. Barbee
Foreman of the Jury

OR

We, the jury, find and determine that the answer to Special Issue Two is "No" because at least ten (10) jurors have a reasonable doubt about the matter inquired about.

Foreman of the Jury

VERDICT

We, the jury, return in open court, the answers to the Two Special Issues submitted to us, and the same is our verdict in this case.

/s/ R. E. Barbee
Foreman of the Jury



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JUDGMENT

On the 13th day of October, 1986, this cause was called for trial and the State appeared by her District Attorney, Ernie B. Armstrong, and the Defendant appeared in person and his counsel, Frank W. Conard, II, also being present, and both parties announced ready for trial and the State having made known that it would seek the death penalty in this cause and the Defendant having been heretofore arraigned and pleaded NOT GUILTY to the charge contained in the indictment herein; and it appearing to the Court that the Defendant was mentally competent and the Defendant having been charged in the indictment with capital murder, thereupon a jury of good and lawful men and women, to-wit: R.E. Barbee, and eleven others, was duly selected, impaneled and sworn, who, having heard the indictment read, and the Defendant's plea of NOT GUILTY thereto, and having heard the evidence submitted, and having been duly charged by the Court, as to their duty to determine the guilt or innocence of the Defendant, and after hearing arguments of counsel, retired in charge of the proper officer to consider their verdict, and afterward were brought into open Court on the 12th day of November, 1986, by the

proper officer, the Defendant and his counsel being present, and in due form of law returned into open Court the following verdict, which was received and accepted by the Court, and is here now entered upon the minutes of the Court, to-wit:

"We, the Jury, find the Defendant, Dorsie Lee Johnson, Jr., guilty of capital murder as charged in the indictment.

R. E. Barbee
Foreman"

The Defendant having been found guilty by verdict of the jury of capital murder committed on the 23rd day of March, 1986, and the jury having heard all the evidence and argument of counsel and being again charged by the Court retired to consider its verdict and after due deliberation returned into open court on the 14th day of November, 1986, with their answers to the following issues and their verdict:

Special Issue One – Was the conduct of the Defendant, Dorsie Lee Johnson, Jr., that caused the death of the deceased, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

Answer To Special Issue One:

"We, the Jury, unanimously find and determine beyond a reasonable doubt that the answer to Special Issue One is "yes".

R. E. Barbee

Foreman of the Jury"



RECORDED IN CRIMINAL MINUTES
VOLUME 15 PAGE 165

Special Issue Two – Is there a probability that the Defendant, Dorsie Lee Johnson, Jr., would commit criminal acts of violence that would constitute a continuing threat to society?

Answer To Special Issue Two:

"We, the Jury, unanimously find and determine beyond a reasonable doubt that the answer to Special Issue Two is "yes".

R. E. Barbee
Foreman of the Jury"

And the Court duly accepted the verdict and ordered the same to be filed. Upon the receipt of the jury verdict the Court then discharged the jurors and preceded to sentence the defendant, Dorsie Lee Johnson, Jr., as follows, to-wit:

The Defendant, Dorsie Lee Johnson, Jr., was asked by the Court whether he had anything to say why sentence should not be pronounced against him and the Defendant answered nothing in bar thereof. The Court proceeded in the presence of the said Defendant, Dorsie Lee Johnson, Jr., and his counsel of record, Frank W. Conard, II, and pronounced sentence against him as follows:

IT IS THE ORDER OF THE COURT that you, the Defendant, Dorsie Lee Johnson, Jr., who has been adjudged to be guilty of capital murder as found by the jury in the indictment, it being mandatory that your punishment be death, it is therefore the order of this Court that your punishment be death and before the hour

of sunrise on a date to be determined by this Court upon a mandate of affirmance issued by the Texas Court of Criminal Appeals at the State penitentiary at Huntsville, Texas, you be caused to die by intravenous injection of substance or substances in a lethal quantity sufficient to cause your death and until you, the said Dorsie Lee Johnson, Jr., are dead. Said execution procedure to be determined and supervised by the Director of the Texas Department of Corrections and that the Clerk of this Court issue a death warrant in accordance with this sentence directed to the Director of the Texas Department of Corrections, or in case of his death, disability or absence, the Warden of the Huntsville Unit of the Texas Department of Corrections, or in the event of the death, disability or absence of both such Director and Warden, then to such other person as is appointed by the Board of Directors of the Texas Department of Corrections for that purpose and to deliver such warrant to the Sheriff of the County of Scurry, State of Texas, to be delivered by him to the said Director of the Texas Department of Corrections, together with the said Dorsie Lee Johnson, Jr., and the said Dorsie Lee Johnson, Jr., is remanded to jail to await transportation to the Texas Department of Corrections at Huntsville, Texas, and execution of this sentence.

/s/ Gene L. Dulaney
Gene L. Dulaney, Judge Presiding

November 14, 1986
Date Signed

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DORSEY LEE JOHNSON, JR., Appellant
NO. 69, 750, v. -Appeal from Scurry County
THE STATE OF TEXAS, Appellee

OPINION

This is a direct appeal from a conviction of capital murder. V.T.C.A., Penal Code, Section 19.03(a)(2). Appellant was convicted of intentionally causing the death of Jack Huddleston in the course of committing and attempting to commit the offense of robbery. Upon finding appellant guilty of capital murder, the jury affirmatively answered the special issues under Article 37.071(b)1 and 2, V.A.C.C.P. Punishment was then assessed at death. We will affirm.

Appellant alleges seven points of error which we will addresss in the order in which they arose at trial. Appellant does not assert any sufficiency challenges, therefore, recitation of the facts is not required. We do, however, find a brief synopsis of the events which occurred in March 1986, appropriate.

In the early morning hours of Sunday, March 23, 1986, appellant and his accomplice, Amanda Miles, decided to commit a robbery at the Allsup's convenience store in Snyder. After planning the crime deciding that there should be no witnesses, and waiting for the store to clear of customers, the pair entered the store. On the pretext of wanting a particular item, appellant lured Huddleston, the clerk, back to the cooler where he was told this was a robbery and to lie face down on the floor. Appellant then shot the clerk in the back of the neck with a .25 caliber pistol, killing him. Amanda Miles emptied out the cash drawer taking approximately $160.00 (one

hundred sixty dollars). Two cartons of cigarettes were also taken.

Appellant was arrested in April for a subsequent robbery and attempted murder of a store clerk in the neighboring town of Colorado City. It was in the course of investigating this latter offense that appellant confessed to the capital offense committed in Snyder.

In his seventh point of error, appellant alleges that the trial court erred in failing to grant his motion for change of venue. Appellant asserts that the pretrial publicity of his case prevented him from receiving a fair trial, the result of which denied him the right to equal protection and due process. See Article 31.03, V.A.C.C.P.

When a motion for change venue has been denied the standard of review to be applied by appellate courts is whether after review of the record the evidence reflects the trial court abused its discretion in refusing the motion Phillips v. State, 701 S.W.2d 875 (Tex.Cr.App. 1987) cert. denied 477 U.S. 909 (1986). This abuse of discretion must be determined in light of whether outside influences affecting the community climate concerning a particular defendant were inherently suspect. Shepard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); *Phillips*, 701 S.W.2d at 879.

Merely because a case is publicized is not, in and of itself, a sufficient reason to change venue – a venire need not be completely ignorant of the facts and circumstances which surround a particular case. Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975); Eckert v. State, 623 S.W.2d 359 (Tex.Cr.App. 1981) (overruled on other grounds by Reed v. State, 744 S.W.2d 112



(Tex.Cr.App. 1988)). A further factor to be considered is the passage of time. Where a period of time has passed between the publicity complained of and the time of trial, such delays tend to negate the inference that publicity would affect the climate of opinion in a community. Nethery v. State, 692 S.W.2d 686 (Tex.Cr.App. 1985) cert. denied, 474 U.S. 1110, 106 S.Ct. 897, 88 L.Ed.2d 931 (1986); Adami v. State, 524 S.W.2d 693 (Tex.Cr.App. 1975).

Therefore, where the evidence is not sufficient to show that in the community there existed a pervasive feeling that the ability of the movant to receive a fair trial by an impartial jury was doubtful, then the decision rendered by the trial court to deny such a motion will not be disturbed on appeal. Beets v. State, ___ S.W.2d ___ (Tex.Cr.App. No. 69,583, September 21, 1988) slip op. p. 28.

In October, 1986, a hearing was held on appellant's motion for change of venue. Accompanying appellant's motion were ten affidavits from residents of Scurry County. In each affidavit, the affiant swore that in their opinion appellant could not receive a fair trial in the community. However at the hearing, the seven compurgators which appeared testified on cross-examination, that they had changed their minds and now thought appellant could receive a fair trial. In additional support of his motion, and aside from the affidavits attached thereto, appellant introduced into evidence, through several representatives of the local media, news articles printed in newspapers and heard on the radio in Scurry County. The coverage consisted of some 14 to 16 articles of various sizes covering a variety of topics from the actual murder at the time it occurred to a suppression

hearing held shortly before the change of venue hearing and selection of the jury.

The State pointed out through cross-examination of these witnesses that the reporting of the case was fair, non-inflammatory and for the purpose of informing the public of a current event. These witnesses also testified that they believed appellant could receive a fair trial.

The State brought forth seven witnesses from various areas of the county who testified that they had not heard any or at least had heard only very little discussion about the case since its occurrence in March. The medial coverage had little effect on them or on any of the people they knew. Additionally, these witnesses testified that it was their opinion that appellant could receive a fair and impartial trial from a jury made up of Scurry County residents. At the close of evidence and final statements the trial court denied appellant's motion for change of venue.

In reviewing the testimony adduced at the hearing we find that the evidence supports the decision made by the trial court. The record reflects that the type and fashion of reporting was not of the requisite character as to create a suspect environment which would prevent the rendering of a fair trial, thereby depriving appellant of equal protection and due process of law.

Here it was not demonstrated that the publicity was anything other than an accurate reporting of an unusual occurence [sic] in Scurry County. There was no evidence of any prejudicial or inflammatory remarks made in any of the articles. Additionally, the publicity complained of herein took place over the course of more than six months



since the murder and nearly six months since appellant's arrest.

Therefore, the trial court did not abuse its discretion in denying the motion for change of venue. As a result, appellant's seventh point of error is overruled.

Appellant, in his second point of error, alleges that the trial court committed error in denying his challenge for cause of veniremember Nachlinger. Appellant asserts that Nachlinger had already formed a conclusion as to appellant's guilt. See Article 35.16(a)(10), V.A.C.C.P.

In making a determination as to the propriety of rulings on challenges for cause of this variety, the Court will review and determine if the trial court abused its discretion in light of the entire examination of the veniremember. That is, whether the record reflects the evidence tends to reasonably support the trial court's implied findings that the veniremember would be able to perform the tasks that are assigned to jurors in this State. See Hernandez v. State, 757 S.W.2d 744 (Tex.Cr.App. 1988).

Nachlinger testified that he would follow the law as proscribed by the oath and would render a verdict based solely upon the evidence presented at trial. Nachlinger understood the concept of proof beyond a reasonable doubt and would require the State to provide that proof, otherwise he would return a verdict of not guilty.

During the State's voir dire examination the following colloquy took place regarding the prospective juror's feelings on presumption of innocence:

"Q. [Prosecutor] do you understand that that indictment is not evidence that he is guilty. It cannot be used or even considered to be evidence that he is guilty?

"A. Yes, sir.

"Q. Do you understand that?

"A. Yes.

"Q. Having been charged with that offense, it merely means that we can go to trial and try to prove our case. He is presumed innocent and will remain innocent and presumed innocent until such time as the State produces evidence which shows beyond a reasonable doubt that he is guilty.

"A. Yes, sir.

"Q. All right. Do you have any problems with the presumption of innocence that the law affords to any individual?

"A. No, sir. That's fair.

"Q. Would agree you would afford that presumption to this defendant? You have not yet determined in your own mind because you have not heard any evidence and you understand the principle that he is presumed innocent at this time as he sits here in the Courtroom. He is innocent and he is not guilty because there has been no proof.

"A. Yes."

During appellant's voir dire examination, Nachlinger was asked about an answer he entered on his questionnaire regarding his personal philosophy, in which he wrote, "[t]he man killed another man who was holding



down an honest job. I see little need in a trial." When asked whether he remembered specifics about the crime he said he did not, except that he had heard there was a confession and that is why he had written in that response. When questioned further on his feelings regarding appellant's guilt or innocence the following transpired:

"Q. [Appellant] In your heart now – this is not an abstract thing, but how do you really feel inside?

"A. Well, if you know- if I was listening to this and reading what I have read, if he can be proven otherwise, you know, I'm not completely ironed in on one thing anywhere, but, you know, I have been known to change my mind and I can do it. You know, I'm willing to listen to anything. But, like I say, you know, didn't sound real good.

"Q. Well, again, what you say, if it can be proven otherwise, that is – and you said that you heard that he gave a confession and you have heard people talking about and you have heard that it was a cinch deal and what that kind of tells me is that you must have felt that at some point or at least when you wrote this paper out that Dorsie Johnson must be guilty of this. Is that how you felt when you – I mean just general feelings inside and not thinking about what the State has to prove and this and that, but just how you actually felt?

"A. Well, sir, I suppose so.

"Q. Is that – I suppose so. Do you think that that is really an accurate answer: yes or no?

"A. Yes, sir.

* * *

"Q. Do you think that that conclusion and that idea that you have already set up in your mind and expressed by even saying, 'I see little need in a trial,' you think that would influence your actions and your deliberations and your decision if you were on the Jury?

"A. Well, I hope it wouldn't, but I'm sure it probably could.

"Q. In other words, are you saying –

"A. Yes, sir I think I could. I don't know you know.

* * *

"A. Well, you know, you say I have formed a conclusion here. If I was going to take what I have already read and just, you know, pass a verdict now, it would probably be a guilty verdict. But if I was to get on this deal here and, you know, I mean that's not a cut and dried thing in my mind right now, you know. I believe I could go in here open minded, you know. I'd try to do it the best I could.

* * *

"Q. Honestly and from your feelings and not from abstract ideas, but just from your heart?

"A. Well, I'm – you know, I know what you're getting at here. I know what I wrote down on the questionnaire and all, but, well – you know, you just kind of leading it around and I feel like I've told you now two or three times, but I don't really know how to go ahead and tell you is what I'm getting at. I feel like I've already told you this a couple of times, you know. I don't



know really what you're hunting or pushing on here.

* * *

"Q. Do you understand that if a person – if those conclusions from a person or yourself or any Juror influences their decision – in other words, if it caused you to say, well, I think he is guilty, but if he can convince me he is not, you understand that person would have the duty not to be on that Jury?

"A. Yes, sir.

"Q. And do you feel that you would fit that category because of that reason?

[No response]

"Q. Of course, there is nothing wrong with it if you fit that category and because you have read all of those things or heard people talking about them, there is nothing wrong with that. If you feel that you would then that is what I would like to know.

"A. Yes, sir. I believe it could have some effect on my judgment.

"Q. You think – I hate to keep pushing. You say it could have. Do you think it would have?

"A. Yes, sir."

It was at this time that appellant challenged veniremember Nachlinger for cause on the ground that Nachlinger had already formed an opinion as to appellant's guilt. Article 35.16(a)(10), V.A.C.C.P. The judge overruled the challenge and allowed further questioning by the State which drew another objection from appellant

in that pursuant to Article 35.16(a)(10), supra, no further questioning should be allowed.[1] This objection was overruled[2] and examination by the State continued in part as follows:

"Q. [Prosecutor] All right. Now, then, do you know anything – know anything that tells you beyond a reasonable doubt at this time that Dorsie Johnson is the one that committed this crime?

"A. No, sir.

"Q. And would you require the State, that is me and my witnesses, to prove to you beyond a reasonable doubt that this Dorsie Johnson is the one that committed the crime before you found this Dorsie Johnson guilty?

"A. Yes, sir. It'd have to be proven to me."

Nachlinger stated that the State would have to prove appellant's guilt beyond a reasonable doubt, that he

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[1] Appellant also objected based on Article 35.16 (a)(8), which allows for the discharge of a veniremember due to the fact "he had served on a petit jury in a former trial of the same case." There is no evidence in the record to support such an objection nor is this raised in appellant's appeal. Therefore, we need not determine its validity.

[2] Appellant raises the failure of the trial court to suspend examination and discharge Nachlinger pursuant to Article 35.16(a)(10), as a part of his second point of error being discussed herein Although Nachlinger was "unequivocal" in one particular response, when viewed in the context of the preceding examination, the record reflects that Nachlinger was anything but "unequivocal" as to whether, in his opinion, the conclusion regarding appellant's guilt would influence his verdict. Therefore, the trial court did not err in allowing further questioning.



understood the presumption of innocence and would abide by it and that he would render a verdict based upon the evidence adduced at trial. There is sufficient evidence in the record to support the trial court's implied finding of fact that Nachlinger was a qualified juror. Therefore, the trial court did not abuse its discretion in overruling appellant's challenge for cause. Nethery v. State, 692 S.W.2d 686 (Tex.Cr.App. 1985) cert denied, 474 U.S. 1110, 106 S.Ct. 897, 88 L.Ed.2d 931 (1986); Barefoot v. State, 596 S.W.2d 875 (Tex.Cr.App. 1980) cert denied, 453 U.S. 913, 101 S.Ct. 3146, 69 L.Ed.2d 996 (1981). Appellant's second point of error is overruled.

In appellant's sixth point of error he alleges that the trial court erred in denying his challenge for cause as to veniremember Bruner. Appellant alleges that Bruner could not consider a life sentence in a capital case and as a result demonstrated a prejudice against the law applicable to appellant and upon which he was entitled to rely. Article 35.16(c), (2), V.A.C.C.P.

The standard of review in these circumstances turns on whether the trial court abused its discretion by overruling the challenge for cause. In determining abuse of discretion, this court shall review the record and determine if it supports the trial court's implied finding that the prospective juror's views would not "prevent or substantially impair the performance of his duties as a juror in accordance with his instruction and oath." Cockrum v. State, 758 S.W.2d 577 (Tex.Cr.App. 1988) cert. denied ___ U.S. ___, ___ S.Ct. ___, 57 U.S.L.W. 3588 (1989); *Hernandez*, 575 S.W.2d at 752.

The examination of Bruner regarding the imposition of sentence revealed that Bruner would not automatically vote "yes" when answering the punishment questions because not every murder deserved the death penalty, although she felt that a capital crime deserved the death penalty. She stated that she would wait to hear all of the evidence presented at punishment before determining the answers to the punishment questions.

During appellant's examination, Bruner was asked if she would answer the punishment questions "yes" so appellant would receive the death penalty which Bruner had stated was the only proper punishment for a capital crime. To this she responded:

> "A. I'll put it like – if I answered all of these yes because the State proved it, I would answer them all yes. . . . [b]ut if it is not proven to me to answer all of these yes, I'll put one no, yes, or maybe two, whatever. Right now I can't answer that, really."

On further examination by the State, Bruner reiterated that as to the punishment questions, she would not automatically answer them "yes" thereby disregarding the evidence presented. She understood her oath and stated that she would not violate it just so the death penalty could be imposed.

The court, in an effort to clear up any ambiguities in her answers regarding punishment engaged in the following discussion:

[Trial court]



"Q. You would still vote no? Would you still vote no knowing it would possibly be life if you voted no?

"A. Right.

"Q. If it was [sic] failed to be proven to you that it should be yes, could you vote no?

"A. On the second phase – yes, on the second phase. Yes, sir, if its proven.

* * *

"Q. You haven't answered my question. Could you vote no if it was not proven to you that –

"A. Yes.

"Q. – that you can vote yes –

"A. Yes, I could vote no.

"Q. You would do that if the evidence did not show it to be yes?

"A. Yes, sure, I would."

Based on the totality of the voir dire, it is evidence that Bruner would listen to all of the evidence, put her personal feelings aside, and answer the punishment questions based upon that evidence. Although, she initially would have answered the questions "yes" if appellant were found guilty, after the veniremenber[sic] understood the process involved she testified that she would listen to the evidence provided at the punishment phase and would answer the special issue questions on punishment accordingly. As a result, there is sufficient evidence in the record to support the trial court's determination that Bruner's beliefs would not substantially impair her abilities as a juror in light of the instructions and oath.

Hernandez v. State, 757 S.W.2d 744 (Tex.Cr.App. 1988). The trial court, therefore, did not abuse its discretion in overruling appellant's challenge for cause of veniremember Bruner. Appellant's sixth point of error is overruled.

Appellant's fourth point of error alleges that the trial court erred in sustaining the State's challenge for cause of veniremember Graves. Appellant asserts that it was not sufficiently shown that Graves would automatically answer the punishment questions in the negative. See Article 35.16(b)(1), (3), V.A.C.C.P.

In determining whether a potential juror was properly excused for cause due to his or her views on capital punishment, it must be determined if the trial court abused its discretion in its action regarding the veniremember in light of the record. Only where the record supports the trial court's determination that those views would prevent or substantially impair that veniremember's duties in light of the instructions and oath, will the decision made by the trial court be undisturbed on appeal. Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980); Hernandez v. State, 757 S.W.2d 744, (Tex.Cr.App. 1988); Sharp v. State, 707 S.W.2d 611 (Tex.Cr.App. 1986) cert. denied, ___ U.S. ___, 109 S.Ct. 190, 102 L.Ed.2d 159 (1988).

In the present case, after having had the process explained to him, Graves stated that regardless of what the evidence proved he would answer one of the punishment questions "no" so as to not be a participant in the rendering of a death sentence. Graves, in his responses, went on to illustrate that if faced with such a decision as



between the oath and his conscience, he would prefer not to take the oath rather than swear to perform a duty which he could not undertake.

During examination by appellant, Graves stated that he would follow the law in deciding the three punishment issues. Subsequently appellant was asked the following question:

> "Q. Okay. I kind of keep going back, I guess, to the answers of the – if you were a Juror and asked to deliberate on the punishment on a capital crime, again, it would be in the instance where a person was convicted of a capital crime and you were talking about punishment and that being punishment set by the answers to these three questions, could you, in fact, follow your oath to listen to the evidence and decide on the evidence and weigh the evidence and then put an answer – then go ahead and answer these three questions as the evidence indicated?
>
> "A. Yes, but if it meant answering yes to all three, I couldn't because I really don't feel like the death penalty is appropriate."

The mere fact that a prospective juror states that they would not, under any circumstances, answer the punishment questions in the affirmative for any reason, is not, in and of itself, sufficient to disqualify a juror. Hernandez, v. State, 757 S.W.2d 744 (Tex.Cr.App. 1988). However, after review of the record we find that it clearly reflects a "substantial likelihood that [Grave would] balk at the task or falsify an answer" and therefore the trial court committed no error in finding that Graves was unqualified to be a juror. *Id.* It is evident that Graves' views on crime and punishment would substantially impair his

abilities to carry out his duties as a juror in accordance with the oath and instructions necessitated by Texas law. *Id.* at 754. Therefore, as the trial court committed no error, appellant's fourth point of error is overruled.

Appellant in his first point of error alleges that the trial court *sua sponte* excused veniremember Walker over his objections and without a challenge for cause by either party.

Although this is true, appellant mischaracterizes the trial court's action by calling it a *"sua sponte"* excusal. Cf. Green v. State, 764 S.W.2d 242 (Tex.Cr.App. 1989); Nichols v. State, 754 S.W.2d 185 (Tex.Cr.App. 1988) cert. denied, ___ U.S. ___, 109 S.Ct. 819, 102 L.Ed.2d 808 (1989); Rougeau v. State, 738 S.W.2d 651 (Tex.Cr.App. 1987) cert. denied ___ U.S. ___, 108 S.Ct. 1586, 99 L.Ed.2d 901 (1988); Moore v. State, 542 S.W.2d 664 (Tex.Cr.App. 1976) cert. denied 431 U.S. 949, 97 S.Ct. 2666, 53 L.Ed.2d 266 (1977). The Texas Code of Criminal Procedure provides that once a juror is sworn to answer truthfully to the questions to be asked during voir dire, "the court shall then hear and determine excuses offered by prospective jurors for not serving as a juror and if sufficient, discharge those members of the venire." Articles 35.02 and 35.03, V.A.C.C.P.

In the case before us, the State, in the course of examining Walker, inquired into several matters including whether she had responded affirmatively to a question regarding the care and custody of a child under the age of ten years. Walker explained that the child was her grandson and that he stayed with her during the school year so he may attend school locally rather than in Grand



Prairie where his mother lived.[3] She stated that he was eight yeas old and was currently being cared for by a friend while she was at the courthouse for this proceeding. The attorneys elicited from Walker that although her friend could care for the child during the course of the trial and although she characterized her grandson as very independent, if the trial lasted for the expected one to four weeks, she would have a difficult time keeping her mind on the trial. She stated that she wanted to do her civic duty and would like to be on a jury for a trial that would not be so lengthy. Veniremember Walker also stated that if she were a defendant in a criminal trial she would not want a juror who had her state of mind sitting on her jury panel.

The court then told Walker that if she wanted to be excused for these reasons that he would excuse her, if however, she wanted to serve on this jury then she may as she was qualified. The veniremember chose not to serve and asked to be excused. The court excused Walker, expressly pursuant to Article 35.03, over appellant's objection.

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[3] Although it appears that the excuse raised by veniremember Walker is more along the lines of an exemption as per Section 62.106(2) of the Government Code, which states that a person qualified to serve as a juror may nonetheless establish an exemption from service if he has legal custody of a child or children younger than 10 years of age and that service requires leaving them without adequate supervision. We find that this exemption was not raised, therefore, we do not decide the applicability of the exemption, i.e., "legal custody," to grandmothers, such as veniremember Walker.

The objections raised by appellant began with an assertion that the trial court and prosecutor were seeking to exclude Walker because she was black, the same race as the appellant. That the testimony elicited by the State was intended for the sole purpose of having this veniremember excused because she was black. Additionally, appellant objected to the fact that the trial court was excusing her when there was no valid challenge for cause from either party and that the court was doing so based on her testimony which appellant felt was not sufficient to justify her excusal. We disagree.

As previously set out, Article 35.03 provides that it shall be the court that hears and determines the sufficiency of excuses for not serving as a juror. As the legislature has placed this responsibility and discretion upon the trial judges of this state, review of their decisions on appeal shall be whether such a decision constituted an abuse of discretion. That is, does the record reasonably reflect a tendency to support the trial court's holding. Where the record so reflects, decisions as to the sufficiency of excuses and the propriety of excusals rendered by trial courts shall not be disturbed on appeal. However, we feel that the exercise of this authority by trial judges should be jealously guarded and relied upon, not by the parties, but by the judges as a last resort for excusing, what would otherwise be, a proper juror. Cf. Nichols v. State, 754 S.W.2d 185 (Tex.Cr.App. 1988) cert. denied, ___ U.S. ___, 109 S.Ct. 819, 102 L.Ed.2d 808 (1989); Rougeau v. State, 738 S.W.2d 651 (Tex.Cr.App. 1987) cert. denied ___ U.S. ___, 108 S.Ct. 1586, 99 L.Ed.2d 901 (1988); Moore v. State, supra. Appellant's first point of error is overruled.



Appellant's fifth point of error alleges trial court error in overruling appellant's challenge for cause as to veniremember Kiker on the grounds that Kiker could not consider age as a mitigating factor at punishment. See Article 35.16(c)92), V.A.C.C.P.

Appellant misconstrues the law when he characterizes Kiker's inability to consider age as a mitigating factor as a prejudice against the law applicable to the appellant's case. Although not cited in the briefs of either party, this Court has recently determined that it is not error for a trial court to overrule a challenge for cause where it is shown that a juror will not or may not give a particular variety of "mitigating evidence" any consideration. Cuevas v. State, 742 S.W.2d 331 (Tex.Cr.App. 1987) cert. denied ___ U.S. ___, 108 S.Ct. 1488, 99 L.Ed.2d 716 (1988); Cordova v. State, 733 S.W.2d 175 (Tex.Cr.App. 1987), cert. denied ___ U.S. ___, 108 S.Ct. 1488, 99 L.Ed.2d 716 (1988).

The United States Supreme Court has not yet mandated that jurors *must* give any amount of weight to any particular piece of evidence that might be offered in mitigation of punishment. *Cordova*, 733 S.W.2d at 189. What the Court has decided is that the factfinder must not be precluded or prohibited from considering any relevant evidence offered in mitigation of the punishment to be assessed, or in answering the punishment questions. *Cordova* at 189, citing Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) and Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). See also *Cuevas*, 742 S.W.2d at 345. What this means is the factfinder must be allowed to hear the evidence and to act

upon it. Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980).

In Texas, this mitigating evidence is admissible at the punishment phase of a capital murder trial. See Article 37.071, V.A.C.C.P. Once admitted, the jury may then give it weight, if in their individual minds it is appropriate, when answering the questions which determine sentence. *Adams*, 448 U.S. at 46. However, "[t]he amount of weight that the factfinder might give any particular piece of mitigating evidence is left to 'the range of judgment and discretion' exercised by each juror." *Cordova* at 189, quoting Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980); *Cuevas*, 742 S.W.2d at 346.

During the voir dire examination of Kiker, she stated that as between a nineteen year old defendant with the maturity of a twenty-five year old versus a nineteen year old defendant with the maturity of a twelve year old, that as to punishment these people should be treated the same.

It was this inability to consider "either mental age or physical age" as a mitigating factor that appellant based his challenge. The trial court overruled appellant's challenge for cause finding that it was not a proper ground for disqualification.

The mere fact that a prospective juror, during voir dire, acknowledges that in their mind such evidence deserves little or no weight, does not create a sustainable challenge for cause under Article 35.16. See *Cuevas*, 742 S.W.2d at 345; *Cordova*, 733 S.W.2d at 189. We find the trial court committed no error in its ruling. Appellant's fifth point of error is overruled.



Lastly, appellant's third point of error alleges the trial court erroneously granted the State's challenge for cause to veniremember Guzman. Appellant asserts that it was not clear from the record that Guzman could not read or write.[4] Article 35.16(a)(11), V.A.C.C.P.

First, it has long been the law of this state that the statutory requirement that jurors be able to read and write meant something more then [sic] the mere ability to "write his name and nothing more." Hernandez v. State, 506 S.W.2d 884 (Tex.Cr.App. 1974). Rather, the prospective juror should possess the ability to express their ideas in words upon paper. *Hernandez* at 887 citing Johnson v. State, 17 S.W. 252 (1886). This is a determination which rightfully belongs to the trial court and, absent an abuse of discretion, such a finding will not be disturbed on appeal. Garcia v. State, 581 S.W.2d 168 (Tex.Cr.App. 1979) (vacated and remanded on other grounds, 453 U.S. 902 (1981)).

During the State's examination of prospective juror Guzman, she stated that she could read but not very well since the extent of her education went no further then the fourth grade. In regards to the juror questionaire [sic],

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[4] The State was sustained on two separate challenges for cause of veniremember Guzman. The first regarding her ability to read and write and the second that she possessed a conscientious scruple against infliction of the death penalty as well as a bias or prejudice against the law upon which the State was entitled to rely. Article 35.16(b)(1),(3), V.A.C.C.P. Appellant objected to both challenges. As we find the first challenge under Article 35.16(a)(11) proper, we need not address the merits of the second challenge for cause sustained by the trial court and complained of herein by appellant.

Guzman stated that there were words that she did not understand, she did not know how to explain the answers she wished to express, that she "did not know how to put it." Guzman testified she could write but could not spell some of the words in the answers she wanted to put down so she would just leave those questions blank.

Guzman further testified specifically as to the charge that would be given in this case that if it contained "big words" then she would not be able to read and understand the charge. When asked about the three special punishment questions she stated she could read and understand some of them but did not understand the rest. She could not pronounce nor did she know what the word "deliberate" meant or what was the import of that part of the second question regarding "continuing threat to society", although she could read at least the first part of the question. She further stated that she did not know what it meant to "do something deliberately" that she had never seen the word until she saw the charge. Veniremember Guzman further testified that although she could read the instructions, it might however take her as many as five readings before she would be able to answer one question. She stated she would probably still not understand the questions and therefore would have to have somebody explain their meaning to her. Before ruling upon the State's challenge for cause pursuant to Articles 35.16(a)(11), (b)(1), (3), the court asked Guzman the following question:

> "The Court: In talking about intentional, let me read this to you. A person acts intentionally or with intent with respect to the nature of his



> conduct or to a result of his conduct when it is his conscious desire to engage in the conduct of cause the result. Do you know what that means?
>
> "Veniremember Guzman: No, sir."

The court then sustained the State's challenge for cause on all grounds raised over appellant's objections.

The record more than adequately reflects that Guzman, having obtained only a fourth grade education, could not satisfy the statutory requirement of having the ability to read and write. It is clear that she did possess rudimentary grammatical skills, however, these in and of themselves, will not satisfy the statutory requirement. Hernandez v. State, 506 S.W.2d 884 (Tex.Cr.App. 1974). Given the fact that the trial court found Guzman's abilities to be in question, we find from the record sufficient evidence which supports the trial court's decision and therefore, the trial court did not abuse its discretion in sustaining the State's challenge for cause under Article 35.16(a)(11), V.A.C.C.P. Appellant's third point of error is overruled.

We, therefore, affirm appellant's conviction and sentence of death.

McCormick, Presiding Judge

(Delivered June 21, 1989)

En Banc

Publish

Clinton, J., finds the majority is creating a new unsupported rule for reviewing exercise of discretion and therefore joins only the judgment of the Court.

Teague, J., dissents.

Duncan, J., not participating.

DORSEY LEE JOHNSON, JR., Appellant

No. 69,750 vs. Appeal from SCURRY County

THE STATE OF TEXAS, Appellee

## OPINION ON APPELLANT'S MOTION FOR REHEARING

Appeal was taken from a conviction for capital murder.[1] After finding appellant guilty, the jury returned affirmative findings to the statutory special issues.[2] Punishment was assessed by the trial court at death.

On original submission, this Court overruled appellant's points of error and affirmed his conviction.[3] In his motion for rehearing, appellant presented five grounds for rehearing. This Court granted only appellant's fifth ground, in which he complained the trial court erred when it failed to instruct the jury at punishment that they could consider appellant's age, or other factors, as a mitigating circumstance. Appellant cited *Penry v. Lynaugh*,[4] as support for this ground for rehearing.

At trial during punishment, appellant requested an additional instruction on consideration of mitigating evidence. The trial court agreed, and gave this instruction to the jury:

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[1] TEX. PENAL CODE § 19.03(a)(2).

[2] TEX.CODE CRIM.PROC. ANN. art. 37.071.

[3] Johnson v. State, 773 S.W.2d 322 (Tex.Cr.App. 1989).

[4] Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).



> "In determining each of these Issues, you may take into consideration all the evidence submitted to you in the trial of this case, whether aggravating or mitigating in nature, that is, all the evidence in the first part of the trial when you were called upon to determine the guilt or innocence of the Defendant and all the evidence, if any, in the second part of the trial wherein you are called upon to determine the answers to the Special Issues."

The trial court did not specifically apply this instruction to the factor of appellant's youthful age, nor did appellant request the trial court to do so. In addition, this instruction did not present consideration of mitigating evidence as a third special issue upon which the jury could choose to sentence appellant to life imprisonment.[5] It is in this motion for rehearing that appellant has raised for the first time the failure of the trial court to instruct the jury that it could consider appellant's age in mitigation of his punishment.

We will overrule this ground for rehearing for two reasons.

The only mitigating evidence mentioned by appellant in this motion for rehearing is his age at the time of the commission of the instant offense. Appellant does not even state what his age was at the time of the commission of the instant offense. From the decision of this Court on original submission, wherein we described the voir dire of venire person Kiker, we could assume that appellant's

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[5] See TEX.CODE CRIM.PROC.ANN. art. 37.071, Sec. 2(e) & (f) (Vernon's 1991).

age was nineteen when the instant offense was committed.[6]

Because age is the only mitigating factor mentioned by appellant, we will review the instant case from the perspective of determining if the trial court's instructions at punishment permitted the jury to consider and give mitigating effect to appellant's youthful age when he committed the instant offense.[7]

In *Lackey v. State*,[8] this Court held that the defendant's youth was relevant to a proper resolution of the concerns of special issue two.[9] If a juror believed that appellant's violent actions were a result of his youth, that same juror would naturally believe that appellant would cease to behave violently as he grew older. Such a juror would be able, under special issue number two, to express a reasoned moral response to applicant's youth. We find in the instant case, that the art. 37.071 instructions did not restrict the instant jury from considering and giving mitigating effect to the evidence of appellant's age.[10]

We conclude that the trial court did not err when it did not specifically instruct the jury to consider and give effect to appellant's age at trial, since the jury was able to

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[6] See *Johnson v. State*, 773 S.W.2d, at 331.

[7] *Penry v. Lynaugh*, 109 S.Ct. 2934; *Black v. State*, 816 S.W.2d 350 (Tex.Cr.App.1991).

[8] Lackey v. State, 819 S.W.2d 111, at 134 (Tex.Cr.App.1991).

[9] See TEX.CODE CRIM.PROC.ANN. art. 37.071(b)(2).

[10] *Lackey v. State, supra*. See also Graham v. Collins, 950 F.2d 1009 (1992).



express a reasoned moral response to appellant's mitigating evidence within the scope of the art. 37.071 instructions given to them by the trial court. We hold article 37.071 was not unconstitutionally applied to appellant. Appellant's fifth ground for rehearing is overruled.

Appellant's motion for rehearing is denied.

PER CURIAM

(Delivered May 27, 1992)

En Banc

Do Not Publish

Clinton, J., dissents.

**SUPREME COURT OF THE UNITED STATES**

No. 92-5653

Dorsie Johnson,

Petitioner

v.

Texas

ON PETITION FOR WRIT OF CERTIORARI to the Court of Criminal Appeals of Texas.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted limited to Question 1 presented by the petition. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, March 22, 1993. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, April 12, 1993. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m. Thursday, April 22, 1993. The case is set for oral argument on Monday, April 26, 1993. Rule 29 does not apply in this case.

Feburary [sic] 19, 1993